Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

SANDRA TOWERS and ROBERT STURDIVANT,
individually and on behalf of those similarly situated,

Petitioners,

v.

CITY OF CHICAGO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Whether municipal ordinances that impose punitive, in personam fines on a class of innocent vehicle owners violate substantive due process if the ordinances do not include equitable discretion, to abate or mitigate the fine, for those owners who took every reasonable precaution to prevent any unauthorized use of their cars and did not authorize anyone to use their cars?

a) Does this Honorable Court's decision in *Bennis* authorize in personam fines when the local ordinances do not include an innocent owner defense or equitable discretion to mitigate the fines?

2) Whether municipal ordinances that impose substantial mandatory, in personam fines on a class of innocent, non-negligent vehicle owners violate the Excessive Fines Clause or is a five hundred dollar fine and, in some cases, loss of the family car, a de minimus penalty as a matter of law, thereby eliminating any need to consider whether the punishment is grossly disproportional?

a) Does this Court's opinion in *Bajakajian* require municipalities, at a minimum, to consider an innocent vehicle owner's claim that the City's punitive, in personam fine is excessive?

THE PARTIES TO THE PROCEEDING

The Parties to this proceeding are the Petitioners, Sandra Towers and Robert Sturdivant, both individually and on behalf of a class of persons similarly situated, and the Respondent, the City of Chicago.

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Petitioners, Sandra Towers and Robert Sturdivant, respectfully request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for Seventh Circuit in *Towers v. City of Chicago*, 173 F.3d 619 (7th Cir. 1999).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at *Towers v. City of Chicago*, 173 F.3d 619 (7th Cir. 1999). The opinion of the District Court, per Magistrate Arlander Keys, is reported at *Towers v. City of Chicago*, 979 F. Supp. 708 (N.D. Ill. 1998).

STATEMENT OF JURISDICTION

On August 30, 1996, Petitioner Sandra Towers filed a six count complaint in the Chancery Division of Cook County Circuit Court, Case No. 96 CH 9337, against the City of Chicago. The City removed the state action to the District Court pursuant to 28 U.S.C. § 1441. The District Court had jurisdiction over the civil rights counts pursuant to 28 U.S.C. §§ 1331 and 1343(a) and supplemental jurisdiction for the state count pursuant to 28 U.S.C. § 1367.

On February 7, 1997, the parties consented in writing to trial before a magistrate under 28 U.S.C. § 636(c)(1). On September 30, 1997, Magistrate Arlander Keys issued a Memorandum Opinion and Order granting the City of Chicago's Motion to Dismiss with respect to all the federal and state claims. The United States Court of Appeals for the Seventh Circuit had jurisdiction pursuant to 28 U.S.C. § 1291 and this Honorable Court has jurisdiction pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. Statutes and Ordinances Involved

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted.

U.S. Const. Amend. VIII.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amend. XIV, § 1.

The relevant ordinances are voluminous so they are reproduced in Appendix F to this petition.

STATEMENT OF THE CASE

The issue in this case is whether the City of Chicago can impose punitive, in personam fines, and deprive vehicle owners of the use of their cars, even when the owners did not personally violate any City ordinances, did not authorize anyone to use their cars, and took all reasonable precautions to ensure that their vehicles were not used unlawfully.

Petitioners filed claims for themselves and on behalf of a class of innocent vehicle owners whose cars were seized pursuant to City of Chicago (City) ordinances. *Towers v. City of Chicago*, 173 F.3d 619, 622-24 (7th Cir. 1999). Their complaint sought declaratory and injunctive relief as well as damages.

Petitioners described themselves, and the class, as innocent vehicle owners. They maintained they were "innocent owners" because they did not personally violate the City's ordinances, and they did not consent to any use of their cars by the persons who allegedly violated the ordinances. Nonetheless, Petitioners' cars were seized and Petitioners were forced to pay five hundred dollars plus towing and storage costs to retrieve the cars.

In the proceedings below, Petitioners did not claim that loss of use of the family car, plus a five hundred dollar fine, is always excessive, even as applied to innocent, non-negligent owners. Petitioners, instead, maintained that the fine, plus loss of use of the family car, can be excessive, and a violation of substantive due process, as applied to some non-culpable, vehicle owners.

Petitioners further maintained that the City must allow its administrative hearing officers the equitable discretion to consider, on a case by case basis, whether the fine, plus loss of use of the car, is an excessive and unwarranted punishment. Because the ordinances, as written and as applied, do not provide for equitable review or case by case proportionality review, Petitioners asked the lower courts to declare the ordinances unconstitutional.

The City conceded that its hearing officers do not have equitable discretion and, in that respect, Petitioners claimed the ordinances were in conflict with *Bennis v. Michigan*, 516 U.S. 442 (1996), and *United States v. Bajakajian*, 524 U.S. 321 (1998). However, neither of the courts below declared the City's ordinances unconstitutional. Petitioners' complaint was dismissed pursuant to Rule 12(b)(6) so the facts are not in dispute.

A. The City's Ordinances

The City of Chicago has five vehicle impoundment ordinances that direct police officers to seize any vehicle that

was allegedly used in violation of the ordinances. Those ordinances prohibit: loud radios, curfew violations, transportation or use of narcotics, weapons violations, and prostitution. *See* Chicago Municipal Code §§ 11-4-1115 (loud radios), 8-16-020 (curfew), 7-24-225 (narcotics), 8-20-015 (weapons), 8-8-060 (prostitution). Following the seizure, the vehicle is towed to an impoundment area where it remains until the owner pays a five hundred dollar fine plus the towing cost and accumulated storage fees. *Towers*, 173 F.3d at 621 (1999). If the owner acts quickly, the vehicle can be retrieved for approximately six hundred twenty dollars. Storage fees accumulate at a rate of ten dollars per day for the first ten days and twenty dollars per day thereafter.

The City provides an administrative hearing within thirty days of the seizure. The ordinances, however, limit the vehicle owner's available defenses to cases where: (1) the vehicle was stolen and the owner reported it as stolen; (2) the vehicle was being used as a licensed common carrier and the operator of the vehicle did not have knowledge of the alleged ordinance violation; or (3) the owner proves that the presence of the controlled substance (or weapon) was authorized by law. *See e.g.*, Chicago Municipal Code § 7-24-225.

These ordinances are not calibrated based on the gravity of the offense — curfew violations are punished as severely as weapons and narcotics violations. Nor are they calibrated based on the culpability of the vehicle owner — an innocent owner who did not authorize anyone to use his car is punished as severely as a vehicle owner who is selling narcotics out of his car. *Towers*, 173 F.3d at 622-625. Nor are the ordinances calibrated to take into account the severity of the punishment as applied to the vehicle owner's unique circumstances — an affluent vehicle owner with more than one car and plenty of money in the bank pays the same fine as a welfare mom who lives from check to check.

It is not a defense that the owner was not present and did not participate in or condone the alleged ordinance violation. Nor is it a defense that the owner did not know the vehicle was being used in violation of any ordinance or law and had taken all reasonable steps to ensure that the vehicle was only used for a lawful purpose. The City imposes strict liability on the owner even when the owner did not authorize anyone to use his car.

B. Undisputed Facts as to Petitioner Towers

On January 27, 1996, Ray Chambers used Petitioner Towers's car without her permission. While driving Towers's car, Chambers was stopped by Chicago police officers, who allegedly found a controlled substance in the vehicle. Petitioner Towers was not aware that a controlled substance was in her car and she did not give Chambers, or any other person, permission to use her car, let alone to transport a controlled substance in her car. *Towers*, 173 F.3d at 623-627. On February 6, 1996, Towers paid the $500 fine and $225 in accumulated towing and storage fees so she could retrieve her car.

At the administrative hearing, Petitioner Towers was precluded from raising an innocent-owner defense or presenting evidence relating to the hardship she would suffer if the fine was not abated. *Towers*, 173 F.3d at 623-626. None of the ordinance's defenses applied to Petitioner Towers, so on March 8, 1996, a final administrative order was entered against her.

C. Undisputed Facts As To Petitioner Sturdivant

In September 1996, Chicago police officers seized and impounded Petitioner Sturdivant's car. According to the officers who seized the car, a person in possession of a handgun was in Sturdivant's parked car. Sturdivant was not present at the time of the seizure, and he was not aware that anyone was in his car. Nor did Sturdivant authorize anyone to enter his car, with or without a handgun.

Petitioner Sturdivant was precluded from asserting an innocent-owner defense at the final hearing and he was forced to pay a $500 fine, plus towing and storage fees. At first, Sturdivant was unable to pay the fine so he lost the use of his car for several days.

D. Procedural History — District Court

Before the City's administrative order was entered against Petitioner Towers, she filed a federal complaint against the City alleging various civil rights violations. *Towers, et al. v. City of Chicago*, 96 C 0995, (N.D. Ill. 1996) ("Towers I"). Towers I was filed on February 21, 1996 and was assigned to the Honorable James H. Alesia. Her complaint included a request for class certification, and she maintained that the City's administrative hearing process was unconstitutional. In particular, she alleged that the administrative hearing process should allow for an innocent owner defense and for equitable discretion to offset the hardship caused by the fines and loss of use of the family car.

The City filed a motion to dismiss Towers I contending, *inter alia*, that failure to seek state court review, via a common law writ of certiorari, was fatal to Petitioner's federal procedural due process claim. While not conceding that state court review was applicable, Petitioner Towers filed a state petition for writ of certiorari on August 30, 1996, and joined the 42 U.S.C. § 1983 and class action claims raised in Towers I. (Cook County Circuit Court Case No. 96 CH 9337).

Rather than allow for state court review, the City removed the state case to the District Court. This time Petitioner's case was docketed: *Towers, et al., v. City of Chicago*, Case No. 96 C 6510 (N.D. Ill. 1996) ("Towers II"), and was assigned to the Honorable Milton I. Shadur.

On October 9, 1996, Petitioner Towers filed her first amended complaint in Towers II, which added Petitioner

Sturdivant. On November 8, 1996, Towers II was reassigned to the Honorable James H. Alesia, and on November 13, 1996, Petitioners filed a Second Amended Complaint that added Kevin Amos as a plaintiff. *Towers, et al., v. City of Chicago*, 979 F. Supp. 708, 710 (N.D. Ill. 1997).

The parties consented in writing to trial before a magistrate and the City filed a motion to dismiss. On September 30, 1997, the Magistrate issued a Memorandum Opinion and Order that granted the City's Motion to Dismiss and denied Petitioners' Motion To Certify Class and Motion For Preliminary Injunction. *Towers*, 979 F. Supp. 708. Later, a Rule 59 motion to alter or amend the judgment, with respect to Kevin Amos only, was filed. Magistrate Keys, pursuant to a settlement agreement, entered an agreed order of dismissal between Kevin Amos and the City of Chicago.

E. The District Court's Ruling

Petitioners' Second Amended Complaint alleged that the City's ordinances were unconstitutional in that: (a) the ordinances imposed excessive fines on innocent vehicle owners; (b) the ordinances violated substantive due process because they did not provide for equitable discretion to reduce the hardship to innocent vehicle owners; and (c) the notice and pre-judgment attachment provisions of the ordinances are procedurally flawed. The City filed a Rule 12(b)(6) Motion to Dismiss and Magistrate Keys granted the motion.

The Magistrate found that Petitioners presented "both facial and as applied challenges with regard to procedural and substantive due process violations." With respect to the alleged procedural due process violations, the Magistrate found that the City's post-impoundment procedures conformed with *Mathews v. Eldridge*, 414 U.S. 319, 96 S. Ct. 893 (1970) and that notice to the alleged ordinances violator was fair notice to the vehicle owner.

Magistrate Keys then made the following findings with respect to Petitioners' substantive due process claims. First, the City's ordinances "are analogous to in rem forfeiture actions." *Towers*, 979 F. Supp. at 717. Second, this Honorable Court's decision in *Bennis* drew a distinction between innocent owners, who consented to the use of their cars, and innocent owners who did not consent to any use of their vehicles. *Towers*, 979 F. Supp. at 718. Third, Petitioners raised "the same arguments as did the plaintiff in Bennis." *Towers*, 979 F. Supp. at 718. Fourth, although the Second Amended Complaint alleged that Petitioners did not consent to the use of their cars, Magistrate Keys found Petitioners "wrongful or not, authorized others to use their automobiles." *Towers*, 979 F. Supp. at 718. Fifth, the City's ordinances differed from *Bennis* by limiting the fine to five hundred dollars rather than forfeiture of the car.

After assuming that Petitioners were culpable, because they did not report their cars as stolen, Magistrate Keys held that there was no meaningful distinction between the *Bennis* in rem forfeiture and the City's in personam fines. He found no substantive due process violation and no need for equitable discretion, even though he agreed that the state statute in *Bennis* included equitable discretion to protect the interests of innocent owners. *Towers*, 979 F. Supp. at 717-719.

Magistrate Keys made the following findings with respect to Petitioners' excessive fines argument. First, the Eighth Amendment applied to the City's ordinances. Second, Petitioners claimed that Eighth Amendment proportionality review was required at the City's administrative hearing stage. Third, the City's ordinances did not allow for proportionality review even when the claimant was an innocent owner. Fourth, *Bennis*, rather than the excessive fines cases, *Alexander v. United States*, 509 U.S. 549 (1993); *Austin v United States*, 509 U.S. 602 (1993), was the controlling authority. Fourth, under *Bennis* there is no constitutional right to proportionality review. Fifth, Petitioners claimed they "were unaware of, and did not authorize

the use of, their vehicles for illegal purposes." *Towers*, 979 F. Supp of 721. Sixth, the City's ordinances did not require proof that vehicle owners consented to any use of their cars. Seventh, if a car "is not reported stolen, even if an owner does not expressly consent to permit another to use his or her vehicle, the only rational conclusion is . . . the owner gave at least some degree of implied consent to that person to use the car, either before or after its use." *Towers*, 979 F. Supp. at 722. Eighth, if an owner consents, by implication and after the fact, then the owner is responsible for any unlawful use of the vehicle. Ninth, since Petitioners did not allege their cars were stolen they must "have, in some measure, consented to the use of their vehicle." 979 F. Supp. at 722. Tenth, because the ordinances do not require proof of consent, the City's ordinances did not violate the Excessive Fines Clause. *Towers*, 979 F. Supp. at 721-723.

F. The Seventh Circuit's Analysis And Opinion

Petitioners appealed the final judgment that was entered by the Magistrate. In their briefs to the United States Court of Appeals for the Seventh Circuit (Seventh Circuit), Petitioners raised the same constitutional arguments. The Seventh Circuit had jurisdiction pursuant to 28 U.S.C. § 1291.

They claimed that the City's ordinances violated substantive due process, as defined in *Bennis*, because the City's hearing officers did not have equitable discretion to nullify or mitigate the fines as applied to innocent owners. Petitioners also maintained, again, that the Excessive Fines Clause applied to the ordinances and that the ordinances did not provide for case by case proportionality review. Finally, Petitioners renewed their argument that the ordinances' notice provisions and prejudgment attachment were unconstitutional, at least as applied to innocent owners. *Towers*, 173 F.3d 619.

The Seventh Circuit rejected each of these arguments and affirmed the Magistrate's order dismissing the case.

G. Excessive Fines — The Seventh Circuit Analysis

According to the Seventh Circuit, the City's fines serve "little or no remedial purpose" and the ordinances were enacted "in an effort to curb illegal drug and firearm activity . . ." *Towers*, 173 F.3d at 624. Therefore, the Court had to decide "whether they [the fines] violate the Excessive Fines Clause." *Towers*, 173 F.3d at 624.

The Court, citing *Bajakajian*, began by noting that each Petitioner had "unwittingly allowed his vehicle to be used as a receptacle for another's illegal item." *Towers*, 173 F.3d at 625. The Court then concluded that there was no evidence that Petitioners "were involved in any other illegal activity . . ." Petitioners, however, did not report their cars as stolen so "they must have given some degree of consent to the use of their cars . . . either before or after that use." *Towers*, 173 F.3d at 625. Based on that assumption, the Seventh Circuit held that Petitioners "were responsible for allowing their vehicles to be misused." *Towers*, 173 F.3d at 625.

Finally, the Court compared "the amount of the fines to the gravity of the plaintiffs' offense." *Towers*, 173 F.3d at 625. Five hundred dollars was "not a trifling sum," but the City was entitled to "take into consideration that the ordinances must perform a deterrent function . . ." *Towers*, 173 F.3d at 626. The Court believed the fines would induce vehicle owners "to ask borrowers hard questions . . . or to refrain from lending the vehicle whenever the owner has a misgiving about the items that might find a temporary home in that vehicle." *Towers*, 173 F.3d at 626. For that reason, the Court held that the "fine imposed . . . is large enough to function as a deterrent, but it is not so large as to be grossly out of proportion to the activity that the City is seeking to deter." *Towers*, 173 F.3d at 626.

H. Substantive Due Process — The Seventh Circuit Analysis

Petitioners maintained that *Bennis* was distinguishable from their case on at least two grounds. "[F]irst, Bennis involved in rem forfeitures whereas this case involves in personam fines, and second, the statute in Bennis provided the courts with equitable discretion to protect innocent owners whereas the ordinances in this case do not." *Towers*, 173 F.3d at 626. Petitioners claimed that those differences, when applied to the City's fines, required a different result in their case. The Seventh Circuit disagreed.

With respect to this constitutional issue, the Seventh Circuit sided "with the City that any distinction between in rem forfeitures . . . and in personam fines . . . is one of form, but not substance." *Towers*, 173 F.3d at 626. The only substantive difference the Court perceived, between the *Bennis* in rem proceeding and the City's in personam fines, was that "the in personam fine results in a fixed economic penalty." *Towers*, 173 F.3d at 627.

This perceived functional difference led the Seventh Circuit to conclude that equitable discretion, like that provided in the Michigan statute in *Bennis*, was not necessary as applied to the City's fines. The court noted:

> Discretion to mitigate an innocent owner's forfeiture is less important when, as in this case, the statute or ordinance imposes a fixed fine rather than forfeiture of an entire item regardless of its value, because a fixed fine removes the potential for drastically, or exorbitantly, harsh penalties on an innocent owner. Therefore, these ordinances are not subject to the danger of "exorbitant applications."

Towers, 173 F.3d at 627.

I. Procedural Due Process Analysis — The Seventh Circuit Analysis

Petitioners maintained that "timely notice of the right to contest the loss of property is . . . an essential part of procedural due process." *Towers*, 173 F.3d at 627. The parties agreed "that the use of one's automobile . . . is a property right protected by the Due Process Clause." *Towers*, 173 F.3d at 628 (citing *Sutton v. City of Milwaukee*, 672 F.3d 644, 645 (7th Cir. 1982). Thus, the issue for the Seventh Circuit was whether notice to the person who violated the ordinance was adequate notice to an innocent owner, who must request a preliminary hearing within twenty four hours of the seizure. The Court acknowledged that: (a) the person who used the car might not be interested in notifying the owner that the car was impounded; and (b) the ordinance violator might be in custody and unable to promptly notify the owners.

These deficiencies in the notice provisions caused the court some concern. However, the Court concluded that Petitioners would not have prevailed at the preliminary hearing stage, since none of the ordinances' defenses applied to them, so that any deficiency in the notice was harmless.

The court, therefore, affirmed the Magistrate's order dismissing the case and further held that the class certification motion was moot.

REASONS FOR GRANTING THE WRIT

This Court should grant the writ of certiorari for several reasons. First, the Seventh Circuit's opinion creates a case of first impression for this Honorable Court on a topic which is ripe for review. The proliferation of quasi forfeiture laws, that are pushing constitutional extremes, calls for a clear statement of the constitutional outer limits on legislation that punishes the innocent. Second, the Seventh Circuit's opinion creates a conflict among the circuits with respect to important constitutional concerns. Third, the Seventh Circuit misapplied

this Court's holdings in *Bennis* and *Bajakajian* and thereby created unnecessary confusion on constitutional issues that are sure to recur.

I.

THE SEVENTH CIRCUIT'S OPINION RAISES AN ISSUE OF FIRST IMPRESSION.

Prior to the Seventh Circuit's decision in Petitioners' case, no court had held that a municipality could impose a punitive, in personam fine on an innocent, non-negligent vehicle owner. In *Bennis v. Michigan*, 516 U.S. 442 (1996), this Honorable Court upheld a Michigan in rem forfeiture action. But this Court based its holding on the history of in rem actions and the equitable discretion, vested in the state court, to offset undue hardships for innocent owners. The Seventh Circuit applied *Bennis* to an in personam fine and to an ordinance which was devoid of equitable discretion.

In *United States v. Bajakajian*, 524 U.S. 321 (1998), this Honorable Court held that a mandatory in personam fine was unconstitutional as applied to an admittedly guilty person. The Seventh Circuit side stepped *Bajakajian* by noting that the City's fixed penalty, five hundred dollars plus towing costs and storage fees, always was proportional to the alleged ordinance violations. Thus, the issue presented here falls between the holdings in *Bennis* and *Bajakajian*.

The Seventh Circuit's opinion, while a case of first impression, is at odds with the historical analysis this Court applied in *Bennis* and in *Bajakajian*. As a result, the Seventh Circuit's opinion creates a conflict or, at a minimum, more uncertainty among the circuits. This Court should grant the writ to resolve: (a) whether a municipality can impose punitive, in personam fines on innocent owners; and (b) if municipalities have that authority, what, if any, constitutional restraints limit the authority to punish the innocent. Put another way, the

question is whether innocence is a constitutional irrelevancy. Petitioners maintain that, at the very least, innocence must be considered as a mitigating factor before punishment is imposed.

The need for constitutional clarity is particularly pressing on this rapidly expanding issue. With increasing regularity, state and local governments are passing forfeiture legislation as a means of generating money. These ordinances often have lawful intentions mixed with an interest in generating money. *See* Range and Witkin, *The Drug-Money Hunt*, U.S. News and World Report, August 21, 1989, p. 22; Heilbroner, *The Law Goes on a Treasure Hunt*, N.Y. Times, Dec. 11, 1994, p. 70, col. 1. To ensure that economic interests don't trample on fundamental rights, this Honorable Court should establish a procedure by which constitutional limits must be measured.

Forfeiture ordinances are money making machines. More than a billion dollars in assets were on deposit with the United States government in 1998. *See Making It Harder To Seize Property*, New York Times, June 29, 1999, at 5, 22. The stakes are so high that government agencies fight among themselves to get bigger pieces of the forfeiture pie. *See Forfeiture Spoils, Conflicting Laws Spark High-Stakes Battle*, Chicago Daily Law Bulletin, July 6, 1999, at 3, 24.

Increasingly, the focus of these law is less on crime and more on fund raising. United States Representatives Bob Barr, Georgia, recently remarked that, "the monetary tail [is] wagging the law-enforcement dog." *Making It Harder To Seize Property*, at 22. The former chief of the Bronx Attorney General's forfeiture unit noted that "Forfeiture laws have run amok. The focus is no longer on combating crime. It's on fund raising." *Forfeiture Spoils*, at 3.

The potential for local ordinances that push the constitutional envelope to its outer limits is becoming a day to day reality as the financial stakes increase. *See* Range and Witkin, *The Drug-Money Hunt*, U.S. News and World Report,

August 21, 1989, p. 22; Heilbroner, *The Law Goes on a Treasure Hunt*, N.Y. Times, Dec. 11, 1994, p. 70, col. 1. In the three months since the Seventh Circuit decided Petitioners' case, the Town of Cicero (a Chicago suburb) and the County of Cook passed similar quasi-forfeiture legislation. Cicero proposes five hundred to seven hundred and fifty dollar fines on any alleged gang member who drives a car within the town limits. Cook County's recent legislation imposes similar fines on any vehicle owner whose car is used to transport fireworks. More such ordinances are sure to come.

As Justice Thomas observed in *Bennis*, "Improperly used, forfeiture could become more like a roulette wheel employed to raise revenue from innocent but hapless owners . . . ." *Bennis*, 516 U.S. at 456. For the innocent, the City of Chicago's roulette wheel has no winning numbers.

Neither the Magistrate nor the Seventh Circuit had a fully developed record with respect to the fact intensive analysis that *Bajakajian* and *Bennis* require. For example, the Seventh Circuit held that the fine and loss of use of the car were necessary "to induce vehicle owners to ask borrowers hard questions about the uses to which the vehicle would be put or to refrain from lending the vehicle whenever the owner has a misgiving about the item that might find a temporary home in that vehicle." *Towers*, 173 F.3d at 627. But the court had no reason to assume that Petitioners neglected to ask the "hard questions" or that petitioners had any "misgivings." In fact, as alleged here, neither Petitioner consented to any use of their cars.

Nor does it make any difference, under the City's ordinances, whether the hard questions were asked or that there was no reason to suspect an illegal item might find a temporary home in the owner's vehicle. These considerations, while relevant under *Bajakajian & Bennis*, are irrelevant to the City. No matter how many hard questions are asked and no matter how scrupulously careful the owner is, he loses under the City's ordinances.

There must be a constitutional outer limit beyond which forfeitures and in personam fines cannot be pushed. This Court reserved that question in *J. W. Goldsmith Co. v. United States*, 254 U.S. 505, 512 (1921) "when such application shall be made it will be time enough to pronounce upon it" and again in *Bennis*, where the state statute allowed for equitable discretion to prevent exorbitant applications. The time to pronounce upon this question is now at hand.

II.

THE SEVENTH CIRCUIT'S OPINION CREATES A CONFLICT AMONG THE CIRCUITS.

The Seventh Circuit's opinion sweeps the *Bennis* and *Bajakajian* equitable considerations under the rug. In effect, the court found that loss of the use of the family car, plus a five hundred dollar fine and towing and storage costs, is de minimus so proportionality review is not required. *But see*, *United States v. Sarbello*, 985 F.2d 716 (3rd Cir. 1993); *United States v. Alexander*, 108 F.3d 853 (8th Cir. 1997); *United States v. Real Property Known and Numbered, As 415 East Mitchell Avenue*, 149 F.3d 472 (6th Cir. 1998).

Petitioners do not claim that the City's fines are excessive when applied to people who themselves violate the ordinances. Nor do Petitioners claim that the City's hearing officers always must abate the fine as applied to innocent vehicle owners, those who did not violate the ordinance, did not authorize anyone to use their cars, and took reasonable steps to assure that their cars were only used for lawful purposes.

Even as to these innocent owners, the requested remedy is merely a hearing at which their innocence is a potential mitigating factor. Vehicle owners who fall into this discrete category are constitutionally entitled to assert equitable defenses that either nullify or abate the proscribed penalties.

By denying Petitioners, and the class they represent, the right to submit evidence that they did not authorize any use of their cars or that they would suffer an undue hardship if fined, the Seventh Circuit created a conflict among the circuits. *See Sarbello* and *Alexander*, *supra*.

The historical basis for the Eighth Amendment included a concern for the person's ability to pay the fine. It was not the size of the fine alone but rather the fine as compared with the ability to pay it that led to the excessive fines provisions in the Magna Charta and the English Bill of Rights. According to Blackstone, "no man shall have a larger amercement imposed upon him than his circumstances or personal estate will bear." 4. William Blackstone, *Commentaries* 372. Thus, the history of the Excessive Fines Clause suggests that the circumstances of the person being fined are relevant considerations. Magna Charta, 9 Hen. III. Ch. 14 (1225), Stat. At Large 6-7 (1762 ed.) as cited in *Bajakajian*, at 2037.

Petitioners maintained that the City's ordinances flunk that constitutional test and the City concedes that no such inquiry is allowed by its ordinances. The Seventh Circuit, nonetheless, held that as long as the fine is not too large, the ability to pay it is irrelevant.

Ordinances that punish the guilty are not at issue here. Instead the constitutional question is what is the outer limit for punitive fines that are imposed on persons innocent of any wrongdoing? Is it a fixed amount, say $100,000 dollars, or is due process a more flexible concept? The Seventh Circuit held that a five hundred dollar fine plus an indefinite loss of use of the family car never violates the Due Process Clause or the Excessive Fines Clause. As a result, there is no need for equitable discretion or case by case proportionality review of the City's ordinances, according to the Seventh Circuit. *But see Alexander*, *supra*.

Would the result be the same, if the fine were significantly higher? Perhaps not, but the Seventh Circuit's analysis leaves the City, and any other municipality that reads the *Towers* opinion, free to up the ante.

Because the Seventh Circuit affirmed a Rule 12(b)(6) dismissal order, the Court's holding apparently applies to anyone, not just the Petitioners. The Court did not know the details of Petitioners' efforts to prevent others from using their cars nor did the Court know how severe the City's punishment was, as applied to Petitioners' personal circumstances.

Petitioners had alleged that no one had permission to use their cars and that they did not know of, authorize or condone any use of their cars, let alone an illegal use. The Seventh Circuit Court brushed those allegations aside and found, without any supporting evidence, that Petitioners pled their way out of court by admitting they did not report their cars as stolen.

If that is true for Petitioners, there is no reason to believe a different rule applies for anyone else. Failure to report the car as stolen is an admission of guilt and the City's fixed punishment is plainly fair, according to the Seventh Circuit, a result which is in direct conflict with this Court's decision in *Bajakajian*.

It does not matter whether the person who entered Sturdivant's car was a total stranger, a juvenile prankster, or a thief looking for valuables left in the car. Nor does it matter that the police saw no reason to charge the culprit with car theft or that Petitioner Sturdivant knew less about the circumstances of the arrest then the police knew. Sturdivant loses because he did not report his car as stolen regardless of any other relevant equitable concerns.

The same is true for Petitioner Towers. She alleged that Chambers, the person caught driving her car, did not have permission to use her car at all. The Seventh Circuit, nonetheless, imputed after the fact consent because Towers did not report her car as stolen.

A hearing, at which her failure to report the car as stolen, is taken into account is all that Petitioner Towers requested. But, at that hearing, she should be allowed to present evidence that she had asked the "hard questions" and she had no misgivings because, for example, she told Chambers never to use her car.

By drawing a per se, adverse inference from the failure to report Petitioners' cars as stolen, the Seventh Circuit eliminated the equitable discretion that saved the Michigan statute in *Bennis*. In that respect the City's fines are like the mandatory fine in *Bajakajian*. But this Court held that the *Bajakajian* fine was unconstitutional as applied to a guilty party. The City imposes its fines even on the innocent.

The only explanation for these incongruities is that the Seventh Circuit believes a five hundred dollar fine and loss of use of a car is de minimus so that equitable discretion is unnecessary. The Seventh Circuit refused to consider Petitioners' personal circumstances and, in that regard, the Court's proportionality analysis is flawed and is in direct conflict with the Eighth Circuit's analysis of this issue in *Alexander*. This Court should grant the writ of certiorari to resolve that conflict.

III.

THE SEVENTH CIRCUIT'S ANALYSIS OF *BENNIS* IS FUNDAMENTALLY FLAWED.

Bennis holds that when vehicle owners consent to the use of their cars, the cars are forfeitable in an in rem proceeding. However, that rule has at least three caveats.

First, the forfeiture is limited to in rem proceedings and is based on "a long and unbroken line of cases" applying the fiction that the res, not the owner, is being punished. *Bennis,* 516 U.S. at 446; *The Palmyra* 12 Wheat. 1, 14, 6 L. Ed. 531 (1827). Second, the res is not forfeitable when it was used without the owner's consent. *Id.* at 448, n.5. In rem forfeiture cases draw a

distinction between those situations where a vehicle is used without the owner's consent and those where the owner consented to a use, even if he was not aware of, and did not authorize, the manner in which the vehicle was used. *See J.W. Goldsmith, Jr. Grant Co. v. United States*, 254 U.S. 505, 512 (1921). Third, even when the owner consents and the proceeding is in rem, there must be some measure of equitable discretion, like that applied by the Michigan judge in *Bennis*, to offset the hardship caused to innocent owners.

The City's ordinances impose in personam fines and they do not allow for equitable set-offs so they are beyond the constitutionally permissible boundaries, even for in rem proceedings.

In fact, Petitioners' claims are more compelling than the ones presented in *Bennis* and *Bajakajian*. Petitioners committed no crimes and were not even present when the alleged ordinance violation occurred. In *Bajakajian*, the claimant was personally guilty of a felony offense and, in *Bennis*, although the res not the owners was punished, one of the vehicle owners was guilty of a criminal offense. Neither Towers nor Sturdivant was guilty of any misconduct, a fact that enhances their equitable claims.

As Justice Ginsburg explained in *Bennis*, "the car in question belonged to John Bennis as much as it did to Tina Bennis." 516 U.S. at 457. Thus, John Bennis "at all times had her (Tina Bennis) consent to use the car . . . ." *Id.* Petitioners' case presents different circumstances because here it is alleged that the owners (Towers and Sturdivant) did not authorize anyone to use their cars.

Thus, *Bennis* is distinguishable on at least three grounds. First, the proceeding in *Bennis* was in rem. Second, in *Bennis* the in rem forfeiture was directed at a co-owner of the car and that co-owner had committed the underlying criminal offense. Third, the nuisance abatement statute in *Bennis* included the equitable discretion to mitigate the fine in response to a claim

of innocent ownership. No such discretion is allowed by the City's ordinances.

These distinctions are compelling evidence that *Bennis*, as applied to the City's ordinances, requires a finding in favor of Petitioners.

IV.

THE SEVENTH CIRCUIT'S EXCESSIVE FINES ANALYSIS IS FLAWED.

Both the District Court and the Seventh Circuit held, without stating, that the Excessive Fines Clause is applicable to the States and their political subdivisions. Like the protection from excessive bail, the English version of the excessive fines prohibition was intended to curb the excesses of English judges under the reign of James II. *Ingraham v. Wright*, 430 U.S. 651, 664 (1977). The protection against excessive bail is incomplete without the prohibition against excessive fines; both protected the King's enemies from imprisonment, the first from incarceration prior to trial and the latter after imposition of sentence. *Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 267(1989) ("In the 1680's the use of fines 'became even more excessive and partisan,' and some opponents of the King were forced to remain in prison because they could not pay the huge monetary penalties that had been assessed.")

The Framers of our Bill of Rights were aware, and took account of, the abuses that led to the 1689 Bill of Rights. *Browning-Ferris Industries v. Kelco*, 492 U.S. at 267, citing 2 J. Story, *Commentaries on the Constitution of the United States* 624 (1873). The "predominate political impulse" of proponents of the Bill of Rights "was distrust of power, and they insisted on constitutional limitations against its abuse." *Weems v. United States*, 217 U.S. 349, 372 (1910). The rationale for imposing upon the States the prohibition against excessive bail applies

equally to excessive fines. This Court should affirm that part of the lower courts' holdings that held the fines imposed under the City's ordinances are subject to the limitations of the Excessive Fines Clause.

Petitioners' complaint alleged that under the City's five ordinances, a "civil penalty" will be imposed upon them which constitutes a "personal debt due and owing" the City. The complaint further alleged that the fines imposed are excessive for they are grossly disproportionate to their culpability as innocent, non-negligent owners of vehicles in which a violation occurred. Complaint at 25-31. Petitioners never consented to allowing their vehicles to be used in any illegal manner nor "knew or should have known" that an occupant of their vehicle would violate the ordinances in their vehicle. Some class members did not consent to the use of their cars at all. Petitioners allege that the fine imposed upon them will range between five hundred dollars and temporary loss of the use of their vehicle to, in the case of those unable to pay the fine, towing and accrued storage charges, the total loss of their vehicle.

The Seventh Circuit stated that the fines "appear to serve little or no remedial purpose;" rather, it is "clear" that the fines serve the punitive purpose of deterring owners from "allowing" their vehicles to be used for illegal purposes. The court noted that the City admitted, at oral argument, that the ordinances were enacted to supplement the criminal laws with "a deterrent that does not require the government to meet the high burden of proof required for a criminal conviction." The opinion reasoned that under *Austin v. United States,* 509 U.S. 602 (1993) and *Bajakajian*, the fines constituted payment "as punishment for some offense" subject to the confines of the Excessive Fines Clause. It held that the fines need to be evaluated "on the facts of a particular case" and that their review of whether such fines were grossly disproportionate to the gravity of plaintiffs' offenses was *de novo.*

The court described the members of the class as those who have "unwittingly allowed their vehicle to be used as receptacles for another's illegal item." However, the opinion refuses to accept the "notion that the plaintiffs must be considered completely lacking in culpability." The court reasoned that since the owners did not timely report their vehicles as stolen, each must have "given some degree of consent to the use of their car by others, either before or after that use" and that, under *Bennis,* innocent owners may be held responsible for the vehicle's "misuse."

Bennis, however, does not stand for the proposition that a state has *carte blanche* to enact legislation which targets and punishes innocent owners. Instead, this Court held in *Bennis* that, within the Michigan statutory scheme, Mrs. Bennis' due process rights were not violated when she, an innocent spouse, was punished as a secondary consequence of the rightful punishment of her husband by the forfeiture of their jointly-owned vehicle.

The Michigan statutory scheme included a chancellor with equitable discretion to avoid "exorbitant applications of the statute." *Bennis* at 457 (Ginsburg, J., concurring). Here, the Chicago ordinances target the owner of vehicles knowing that, within its net, it will catch and punish completely innocent persons; for some, the punishment will be the loss of their vehicle. The Excessive Fines Clause "limits the ability of the sovereign to use its prosecutorial power, including the power to collect fines, for improper ends" and is intended "to prevent the government from abusing its power to punish." *Browning-Ferris Industries v. Kelco*, 492 at 266-6. The City has abused its prosecutorial powers for improper ends by punishing the innocent to fill its coffers.

The complaint defines the class as persons who did not engage in any conduct proscribed by the ordinances, did not violate any state or federal law, did not consent to, know of,

have reason to know of, or could have prevented an ordinance violation in their vehicle. Complaint at 25-31. The alleged class includes some members, like the named Petitioners, who did not consent to the use of their vehicle at all but who did not report their vehicles stolen within twenty four hours of their loss of possession. Nonetheless, the Seventh Circuit found that all members were, to some extent, culpable and the fine, therefore, not excessive.

The court justified the City's imposition of fines upon innocent owners based upon the legitimate deterrent function served; that such deterrence would force vehicle owners to ask "hard questions" to prospective borrowers of their vehicles "whenever the owner has a misgiving about the items that might find a temporary home" in their vehicle. This analysis illogically assumes that faultless behavior can be properly influenced by imposing a deterrence sanction. It cannot. Even if a class member has no reasonable misgivings about the individual who wants to borrow her vehicle and asks every hard question imaginable to such person, she still will be punished under the ordinance if a violation occurs in the vehicle.

For example, Parishioner loans her car to Minister to attend a church picnic. En route, Minister sees Teenager shot and in need of emergency medical attention. Minister carries Teenager to the vehicle and drives him to the nearest hospital where Teenager receives lifesaving medical assistance. Medical personnel discover a marijuana cigarette in teenager's pocket. Under the ordinance, law enforcement may impound Parishioner's vehicle and she has no defense to imposition of the City's "civil penalty." If she is without sufficient funds to pay the fine, the City will sell her car to satisfy the fine.

During oral arguments in the Seventh Circuit, the City admitted that certain abuses under the ordinance can only be avoided by police discretion. A panel member asked whether his car could be impounded if his parking lot attendant, with a

marijuana cigarette in his pocket, was stopped while parking the judge's vehicle. The City admitted that a violation would "technically" occur, but assured the court that executive discretion would prevent impoundment or imposition of a fine. These assurances mean little to the plaintiff class who might be on the other end of law enforcement's "discretion." To have their right against excessive fines contingent upon such discretion is tantamount to making it illusory.

It is this discretion which makes these ordinances potentially very dangerous. For instance, the deterrence against police abuse contained in the exclusionary rule fades with enforcement of these ordinances. Although tainted evidence from an illegal stop is excluded at the criminal trial, it is admissible at the City's impoundment hearing and only the innocent are punished. The lack of any culpable state of mind of the occupants of the vehicle also is no defense. For example, Parent permits Child to borrow car on the condition Child returns by 10:30 p.m. — one half hour before the proscribed curfew. On the way home, Child has a flat tire. By the time the tire is fixed, it is 11:05 p.m. The ordinance authorizes seizure of the vehicle and the mandatory fine will be imposed on Parent even though the violation was accidental and unavoidable.

Both the majority and dissenting opinions in *Bajakajian* instruct that the first consideration in determining whether a fine is excessive is to defer to the legislature "in the first instance" as to the appropriateness of the penalty. *Bajakajian* at 2037; *Bajakajian* at 2044 (Kennedy, J, dissenting). Under the City's legislation, a first-time offender of the noise ordinance, the person actually driving the vehicle in which loud noise is played who is charged with a criminal offense, may only be fined a maximum of fifty dollars for his conduct while the vehicle's owner's fine will be tenfold. Municipal Code § 11-4-1115. The curfew ordinance contains no provision permitting imposition of any fine on the violating juvenile while the vehicle owner must be fined five hundred dollars. The

disparity between the legislative scheme's assessment of a reasonable fine for the actual ordinance violator support Petitioners' contention that the fine is grossly disproportionate to the gravity of their offense.

The complaint alleges that the City's fines are both excessive and disproportionate because Petitioners are being penalized without culpability. Penalizing innocent persons is so disproportionate and excessive that "in justice the punishment is more criminal than the crime." *United States v. Sarbello*, 985 F.2d 716, 724 (3rd Cir. 1993). In this respect, both the district and Seventh Circuit courts erred when concluding that all members of the class have failed to allege a Section 1983 claim based upon a violation of the Excessive Fines Clause of the Eighth Amendment.

CONCLUSION

For all of these reasons, Petitioners respectfully request that this Court issue its writ of certiorari to review the judgment of the United States Court for the Seventh Circuit in *Towers v. City of Chicago*, 173 F.3d 619 (7th Cir. 1999).

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DATED AND DECIDED APRIL 16, 1999

Sandra TOWERS, on her own behalf and on behalf of others similarly situated, and Robert Sturdivant, Plaintiffs-Appellants,

v.

CITY OF CHICAGO, Defendant-Appellee.

No. 97-3775.

United States Court of Appeals,
Seventh Circuit.

Argued Oct. 28, 1998.

Decided April 16, 1999.

* * *

Before COFFEY, RIPPLE and EVANS, Circuit Judges.

RIPPLE, Circuit Judge.

The plaintiffs brought this action against the City of Chicago ("the City") to challenge city ordinances that impose a $500 fine upon the owner of a vehicle in which illegal drugs or firearms are found. The plaintiffs now seek review of the district court's decision to grant the defendant's Rule 12(b)(6) motion to dismiss and to deny the plaintiffs' motions for class certification and preliminary injunction. For the reasons set forth in the following opinion, we affirm the judgment of the district court.

Appendix A

I

BACKGROUND

A. The Ordinances

The Municipal Code of Chicago provides that the owner of any vehicle containing illegal drugs or unregistered firearms may be assessed an administrative penalty of $500. See Chicago Municipal Code §§ 7-24-225 (drugs), 8-20-015 (firearms).[1] The relevant ordinances recognize only three defenses to the imposition of the penalty: 1) the vehicle was stolen at the time the illegal item was found in the vehicle, and the theft was reported within 24 hours after the theft was discovered or reasonably should have been discovered; 2) the vehicle was operating as a common carrier and the violation occurred without the knowledge of the person in control of the vehicle; and 3) the owner proves that the item found is not unlawful.

When the illegal item is found in a vehicle, a police officer must seize the car and have it towed to an impoundment facility to secure payment of the administrative penalty. When the vehicle is towed, the officer must provide notice to anyone identifying himself as the owner, or anyone else in control of the vehicle, that the owner can request a preliminary hearing. If requested, the preliminary hearing must be held within 24 hours of

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1. The plaintiffs' class action claim also challenges three other ordinances that impose on vehicle owners a $500 penalty for other particular misuses of a vehicle. See Chicago Municipal Code §§ 8-8-060 (prostitution), 8-16-020 (children on streets at night), 11-4-1115 (sound devices).

the seizure. All interested persons have an opportunity to be heard at the hearing, and the hearing officer determines whether there is probable cause to believe that the illegal item was found in the vehicle and that none of the three defenses applies.

If the hearing officer concludes that probable cause does not exist, then the City must return the vehicle to the owner without charge. If, however, the officer determines that probable cause does exist, or if the owner does not request a preliminary hearing, then the vehicle must remain impounded pending a final hearing, unless the owner posts a cash bond of $500 plus towing and storage costs. Notice of the time, date, and place of the final hearing must be sent to the owner by certified mail, return receipt requested, within 10 days after seizure, and the final hearing must take place within 30 days after the seizure.

At the final hearing, the hearing officer must determine by a preponderance of the evidence whether the illegal item was found in the vehicle and, if so, whether any of the three defenses applies. If the hearing officer finds that no violation occurred, then the City must return the vehicle (or the cash bond) to the owner. If the hearing officer determines that a violation occurred, then he must find the owner liable for the $500 administrative penalty plus applicable towing and storage charges.

B. Facts Relating to Plaintiff Towers

On January 27, 1996, Chicago police officers stopped Ray Chambers while he was driving Sandra Towers' car. The police found a controlled substance in the vehicle.

Appendix A

Pursuant to § 7-24-255 of the Chicago Municipal Code, the police seized and impounded Ms. Towers' car. Ms. Towers had not given Chambers express permission to use her car, let alone to use it to transport a controlled substance, and she did not know that a controlled substance was in her car. Ms. Towers was not present when the car was seized.

Ms. Towers was never informed by the City of her right to request a preliminary hearing within 24 hours of the seizure and thus did not request such a hearing. Between January 28 and February 6, Ms. Towers attempted to retrieve her car by posting the $500 bond and paying the towing and storage fees, but she was unsuccessful because City employees had not completed the necessary paperwork. Ms. Towers was first notified by mail on February 2, 1996, that she was entitled to a final hearing. On February 6, 1996, Ms. Towers obtained her car by paying the $500 bond and $225 in accumulated towing and storage fees. At the final hearing, Ms. Towers was not permitted to assert an innocent-owner defense because the ordinance does not recognize such a defense. On March 8, 1996, a final administrative order imposing a $500 civil penalty was entered against Ms. Towers.

C. Facts Relating to Plaintiff Sturdivant

On an unspecified date in September 1996, Chicago police officers witnessed a person in possession of an unregistered handgun run and jump into Robert Sturdivant's car. Pursuant to § 8-20-015 of the Chicago Municipal Code, the police seized and impounded Mr. Sturdivant's car. Mr. Sturdivant was not present at the time of the seizure and did not know that a gun was in his car. He was never notified

of his right to request a preliminary hearing and thus did not request one.

On October 1, 1996, Mr. Sturdivant received notice of his right to a final hearing. At the hearing, Mr. Sturdivant was unable to assert an innocent-owner defense because the ordinance recognizes no such defense. Consequently, Mr. Sturdivant did not prevail at the final hearing and was found liable for the $500 administrative penalty. Mr. Sturdivant was without his vehicle for more than fifteen days before he was able to pay to have the car released to him. The interrupted use of his vehicle affected his ability to make a living and his access to the necessities and amenities of life.

D. Earlier Proceedings in the State Court and in the District Court

Plaintiff Towers filed this action against the City of Chicago in state court, and the City removed it to federal district court. On January 27, 1997, Ms. Towers filed a second amended complaint, including two additional plaintiffs (Mr. Sturdivant and Kevin Amos) and purporting to represent a class of similarly situated people. The plaintiffs brought federal claims under § 1983 (on their own behalf and on behalf of a putative class of car owners). They alleged that the administrative penalty violated substantive due process and the Excessive Fines Clause; that the procedures specified in the ordinances violated procedural due process; and that the City seized their cars in violation of the Fourth Amendment. Ms. Towers also contended that the City had deprived her of procedural due process by delaying the return of her vehicle after she tendered the required cash bond and fees.

Appendix A

On February 7, 1997, the parties agreed to proceed before a magistrate judge. On September 30, 1997, the magistrate judge, in a comprehensive and thoughtful opinion, granted the City's Rule 12(b)(6) motion to dismiss and denied the plaintiffs' motions for class certification and for preliminary injunction. This appeal followed.[2]

E. Holding of the District Court

The court dismissed all of the plaintiffs' claims for failure to state a claim upon which relief can be granted.

The district court first dismissed the procedural due process claim; it held that, under the balancing test of Mathews v. Eldridge, 424 U.S. 319, 332, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), the ordinances provide adequate procedural protection for the owner. The district court determined that, along with other available state law remedies, the post-deprivation procedures under the ordinances satisfy the requirements of procedural due process. Specifically, with respect to the plaintiffs' claim that they did not receive notice of the preliminary hearing, the court held that the police officers' notice to the person in control of the vehicle was adequate.

The district court also dismissed the plaintiffs' substantive due process claims. It held that the ordinances impose constitutionally permissible civil fines. Finding the City's fines analogous to civil in rem forfeitures, the district court relied on Bennis v. Michigan, 516 U.S. 442, 116 S.Ct. 994, 134 L.Ed.2d 68 (1996), in which the Supreme Court

2. Only Ms. Towers and Mr. Sturdivant appeal; Mr. Amos' claims were dismissed pursuant to a settlement agreement.

upheld the constitutionality of a Michigan in rem forfeiture statute that did not recognize an innocent-owner defense.[3]

The district court also dismissed the plaintiffs' Excessive Fines Clause claims. The court determined that the fines imposed were analogous to fines levied in civil in rem forfeiture proceedings and were not excessive under the Eighth Amendment. The district court rejected the plaintiffs' argument that they were completely without culpability and concluded that, because they did not report the cars stolen, the plaintiffs must have given at least some degree of consent to the use of their cars, either before or after the fact. Accordingly, the district court reasoned, the fines were not excessive in light of their purpose of inducing owners to exercise greater care in entrusting their property to others.

Because the plaintiffs' claims failed to survive the Rule 12(b)(6) motion,[4] the district court also held that their

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3. In the course of its discussion of this issue, the district court rejected the plaintiffs' argument that the City's ordinances are criminal in nature and are thus subject to criminal due process protections. Applying the analysis articulated by the Supreme Court for determining whether a penalty is civil or criminal, see United States v. Ward, 448 U.S. 242, 100 S.Ct. 2636, 65 L.Ed.2d 742 (1980), the district court concluded that the fines imposed under the City's ordinances were civil and thus did not implicate criminal due process protections. The plaintiffs do not appeal the district court's determination in this regard.

4. The district court also dismissed the plaintiffs' claim that the impoundment of their cars constituted an unreasonable seizure under the Fourth Amendment. In the district court's view, the plaintiffs did not demonstrate that the ordinances, or the police officers' execution of the ordinances, were unreasonable.

proposed class action based on those claims must also fail. The district court further held that, even if the plaintiffs' individual claims had survived dismissal, the requirements for class certification had not been met because there was inadequate evidence of numerosity. The district court did not reach the issue whether the plaintiffs had met the other three threshold requirements for class certification.

Finally, the district court denied the plaintiffs' motion for a preliminary injunction. It held that the plaintiffs lacked standing as individuals to request such relief because they could not demonstrate, as required by City of Los Angeles v. Lyons, 461 U.S. 95, 105, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983), impending injury similar to the one already allegedly suffered. Even if the class had been certified, continued the court, the plaintiffs met none of the three threshold requirements for a preliminary injunction: some likelihood of success on the merits, no adequate remedy at law, and irreparable harm.

II

DISCUSSION

A. Excessive Fines

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. The parties have not disputed that the Eighth Amendment's Excessive Fines Clause applies to the civil penalties at issue in this case. Indeed, the Supreme Court has interpreted the Excessive Fines Clause to apply to civil fines. See Hudson v. United States, 522 U.S. 93, 118 S.Ct. 488, 495, 139

L.Ed.2d 450 (1997) (stating that "[t]he Eighth Amendment protects against excessive civil fines, including forfeitures"); Austin v. United States, 509 U.S. 602, 609, 113 S.Ct. 2801, 125 L.Ed.2d 488 (1993) (concluding that the civil forfeiture of property used in a drug crime constituted punishment and was therefore subject to the Excessive Fines Clause). In Austin, the Supreme Court stated that the Excessive Fines Clause "limits the government's power to extract payments, whether in cash or in kind, 'as punishment for some offense.' " Id. at 609-10, 113 S.Ct. 2801 (quoting Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257, 265, 109 S.Ct. 2909, 106 L.Ed.2d 219 (1989)). The Court then explained that civil sanctions can constitute punishment, and therefore are subject to the limitations of the Excessive Fines Clause, if they serve, at least in part, retributive or deterrent purposes. See id. at 610, 113 S.Ct. 2801. The Court ultimately concluded that the civil forfeiture under 21 U.S.C. § 881(a) of a mobile home and an autobody shop that were used in a drug crime constituted a "payment to a sovereign as punishment for some offense" and was thus subject to the limitations of the Excessive Fines Clause. Id. at 622, 113 S.Ct. 2801.

The fines imposed by the City under the ordinances at issue here are not solely remedial. In fact, they appear to serve little or no remedial purpose; they do not compensate the City for any loss sustained as a result of the violations. Rather, it is clear that the fines, at least in part, serve the punitive purpose of deterring owners from allowing their vehicles to be used for prohibited purposes. At oral argument, the City emphasized that the ordinances were enacted in an effort to curb illegal drug and firearm activity

by supplementing the criminal laws with a civil deterrent that does not require the government to meet the high burden of proof required for a criminal conviction. Because the fines, at least in part, serve this deterrent purpose, they constitute payment "as punishment for some offense." Id. at 610, 113 S.Ct. 2801. Therefore, we must determine whether they violate the Excessive Fines Clause.

The Supreme Court of the United States has adopted a "gross disproportionality" test to determine whether a fine is "excessive" for purposes of the Excessive Fines Clause. See United States v. Bajakajian, 524 U.S. 321, 118 S.Ct. 2028, 2036, 141 L.Ed.2d 314 (1998). The Court explained that "[t]he amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish" and held that "a punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense." Id. In Bajakajian, the defendant pleaded guilty to failing to report that he was transporting more than $10,000 in currency out of the country. The district court found the entire amount of the currency — $357,144 — subject to forfeiture under 18 U.S.C. § 982(a)(1). In applying the gross disproportionality standard to the facts of Bajakajian's case, the Supreme Court considered several factors: that the defendant was guilty of only a reporting offense, that the violation was unrelated to any other illegal activities (such as drug dealing, money laundering, or tax evasion), that the maximum criminal sentence would have been six months and the maximum fine $5,000, and that the offense caused only minimal harm. Based on these considerations, the Supreme Court determined that the forfeiture of $357,144 was grossly disproportional to the gravity of Bajakajian's offense. See id. at 2038-39.

Appendix A

The plaintiffs submit that the $500 civil penalty imposed on them violates the Excessive Fines Clause because it bears no relationship to their culpability as innocent owners. They contend that, because they did not know about the illegal items that were found in their vehicles, they are innocent of any wrongdoing and, therefore, the fines imposed are excessive and grossly disproportional to the offense. In evaluating this contention, we note at the outset that the proportionality determination must be made based on the facts of a particular case and that our review of that determination is de novo. See id. at 2037-38 & n. 10. We therefore turn to the factors considered by the Supreme Court in Bajakajian to determine whether the fine imposed by the City violates the Excessive Fines Clause.

We begin by examining the gravity of the offense committed by the plaintiffs. On the record before us, each plaintiff has unwittingly allowed his vehicle to be used as a receptacle for another's illegal item. There is no indication that the plaintiffs' offense was related to any other illegal activities on their part. Although many of the people who are fined under the City's ordinances will also be involved in other illegal conduct connected to the drugs or firearms found in their vehicles, there is no indication in the record that the plaintiffs in this case were involved in any illegal activity related to the items found in their vehicles. Unwittingly lending one's vehicle to an individual who then independently uses it to carry an illegal item cannot be characterized, standing alone, as a transgression exhibiting significant antisocial behavior.

We cannot accept, however, the notion that the plaintiffs must be considered completely lacking in culpability. The

district court concluded, reasonably, that, because the plaintiffs did not report their cars stolen, they must have given some degree of consent to the use of their cars by others, either before or after that use. The district court further concluded, persuasively, that, "[w]hen an owner consents to release control of his or her vehicle to another person, expressly or otherwise, the owner also accepts the risks inherent to that loss of control." R.65 at 32. The City certainly has a right to sanction a vehicle owner who does not ensure that others with access to the vehicle do not place illegal items in it. See Bennis v. Michigan, 516 U.S. 442, 447-48, 116 S.Ct. 994, 134 L.Ed.2d 68 (1996) (discussing a historical line of cases holding owners responsible for the misuse of their property by others). Therefore, although the gravity of the plaintiffs' offense is not high compared to that of persons who themselves place illegal items in their vehicles, the plaintiffs may still be held responsible for allowing their vehicles to be misused.[5]

The harm caused by the plaintiffs' acts, although not readily quantifiable, is certainly real and a legitimate subject of the City's concern. By facilitating illegal activity

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5. Other available penalties for the same offense can provide relevant evidence of the gravity of the offense. See Bajakajian, 118 S.Ct. at 2038 n. 14. In this case, however, the parties have not brought to our attention any other applicable penalties for merely being the owner of a car in which illegal items are found. There are, of course, federal and state statutes allowing forfeiture of any vehicles used to facilitate the transportation, sale, receipt, possession, or concealment of controlled substances. See, e.g., 21 U.S.C. § 881; Illinois Controlled Substances Act, 720 ILCS 570/505. The application of those statutes to the plaintiffs has not been placed in issue.

involving drugs and firearms, the plaintiffs have contributed, however unwittingly, to the spread of drugs and the use of firearms, two major concerns of those responsible for the safety and health of the people of any municipality and a particular concern to a city the size of Chicago. The City is on solid ground both in recognizing that such activity is a contributing factor to the problems it faces and in creating an additional layer of deterrence against such illegal activities to reduce the supportive effect that such activity lends to the drug and firearm problem.

Finally, we compare the amount of the fines to the gravity of the plaintiffs' offense. We must conclude that the fine is not so disproportionate to the gravity of the conduct as to offend the strictures of the Excessive Fines Clause. Five hundred dollars is not a trifling sum. But the City, in fixing the amount, was entitled to take into consideration that the ordinances must perform a deterrent function — to induce vehicle owners to ask borrowers hard questions about the uses to which the vehicle would be put or to refrain from lending the vehicle whenever the owner has a misgiving about the items that might find a temporary home in that vehicle. The $500 fine imposed in this case is large enough to function as a deterrent, but it is not so large as to be grossly out of proportion to the activity that the City is seeking to deter. We do not find the $500 fine imposed in this case to be constitutionally excessive.

B. Substantive Due Process

We turn now to the plaintiffs' substantive due process claim. The plaintiffs submit that the City's ordinances are unconstitutional because those provisions do not recognize an innocent-owner defense. They further contend that the

district court's reliance on Bennis v. Michigan, 516 U.S. 442, 116 S.Ct. 994, 134 L.Ed.2d 68 (1996), to uphold the ordinances was inappropriate for two reasons: first, Bennis involved in rem forfeitures whereas this case involves in personam fines, and second, the statute in Bennis provided the courts with equitable discretion to protect innocent owners whereas the ordinances in this case do not.

In Bennis, police had found the plaintiff's husband engaging in an illegal sexual act in the family car. In the ensuing state civil forfeiture action against the car, the wife's lack of knowledge that her husband would use the car in violation of state law was not a defense to forfeiture of her share of the jointly owned vehicle. See id. at 444-45, 116 S.Ct. 994. The Supreme Court of the United States held that the forfeiture did not violate the Due Process Clause. It stated that "a long and unbroken line of cases holds that an owner's interest in property may be forfeited by reason of the use to which the property is put even though the owner did not know that it was to be put to such use." Id. at 446-50, 116 S.Ct. 994 (discussing The Palmyra, 12 Wheat. 1, 25 U.S. 1, 6 L.Ed. 531 (1827); Harmony v. United States, 43 U.S. 210, 2 How. 210, 11 L.Ed. 239 (1844); Dobbins's Distillery v. United States, 96 U.S. 395, 24 L.Ed. 637 (1877); Van Oster v. Kansas, 272 U.S. 465, 47 S.Ct. 133, 71 L.Ed. 354 (1926); J.W. Goldsmith, Jr.-Grant Co. v. United States, 254 U.S. 505, 41 S.Ct. 189, 65 L.Ed. 376 (1921); and Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 94 S.Ct. 2080, 40 L.Ed.2d 452 (1974)).

In this case, the plaintiffs' first contention is that the historical pedigree enjoyed by civil in rem forfeiture statutes that do not recognize an innocent-owner defense simply

does not apply to this case because the City's ordinances impose in personam fines, not in rem forfeitures. Although the Supreme Court has distinguished between in rem civil forfeiture proceedings and in personam civil fine proceedings for purposes of the Double Jeopardy Clause, see United States v. Ursery, 518 U.S. 267, 116 S.Ct. 2135, 2142, 135 L.Ed.2d 549 (1996), we cannot accept the suggestion that this distinction affects the substantive due process analysis in this case. Rather, we believe that the situation before us today is controlled by the Court's rationale in Bennis.

In Bennis, the Court found no substantive due process bar to subjecting a vehicle owner to civil forfeitures, even though the owner did not know that the vehicle would be used for criminal activity by the joint owner of the vehicle. In this context, we agree with the City that any distinction between in rem forfeitures (which proceed against the offending property) and in personam fines (which proceed against the owner) is one of form, but not substance. Both proceedings result in an economic penalty to the owner because his property was used improperly; both serve the same governmental purpose of deterring unlawful conduct. There is only one functional difference between an in rem forfeiture proceeding and the in personam fines at issue in this case: The in rem forfeiture proceeding results in varying economic consequences from defendant to defendant, based on the value of the property; the in personam fine results in a fixed economic penalty.

Indeed, this single functional distinction is an important consideration in evaluating the plaintiffs' contention that, even if Bennis does apply, the City's ordinances are infirm

because, unlike the statute upheld in Bennis, they contain no provision for the exercise of equitable discretion by the hearing officers to mitigate the loss of innocent owners. This equitable discretion, they contend, was key to the Supreme Court's decision to uphold the Michigan statute in Bennis and particularly key to Justice Ginsburg's concurring vote. The absence of equitable discretion in the ordinances in this case, the plaintiffs submit, distinguishes this case from Bennis and requires invalidation of the ordinances on substantive due process grounds.

In Bennis, the Court did mention that the trial court's remedial discretion weakened the argument for a due process violation. See Bennis, 516 U.S. at 453, 116 S.Ct. 994. Moreover, in her concurring opinion, Justice Ginsburg specifically noted the availability of equitable discretion and commented that it was important to prevent "exorbitant applications of the statute." Id. at 457, 116 S.Ct. 994 (Ginsburg, J., concurring). We understand the import of these remarks to be that, in the context of the Michigan forfeiture statute, this feature was important because, without such a safety valve, that statute could exact from the innocent owner a forfeiture of property of exorbitantly high value in proportion to the owner's responsibility.

In contrast with the forfeiture statute in Bennis, the ordinances at issue in this case impose a fixed fine of $500; this amount does not vary fortuitously with the value of the vehicle involved. Discretion to mitigate an innocent owner's forfeiture is less important when, as in this case, the statute or ordinance imposes a fixed fine rather than forfeiture of an entire item regardless of its value, because a fixed fine removes the potential for drastically, or exorbitantly, harsh

penalties on an innocent owner. As we have already held in considering the plaintiffs' excessive fines argument, the $500 amount does not inappropriately reflect the responsibility of the absentee owner for the use of the vehicle. Therefore, these ordinances are not subject to the danger of "exorbitant applications."

We also note a very important difference between this case and the situation before the Supreme Court in Bennis. In Bennis, the vehicle was, at the time of the underlying offense at issue in that case, in the hands of an individual who shared full ownership rights with his wife. In that case, there truly was an innocent "co-owner." In this case, by contrast, there is no innocent "co-owner." The plaintiffs had the sole authority to decide to whom their vehicles would be lent and to set the restrictions and checks that were appropriate to ensure that the vehicle would not be used to support illegal conduct.

We do not believe that the substantive component of federal due process prevents a state from imposing the civil penalty of $500 on the owner of a vehicle when the owner allows the vehicle to be used by another for illegal activity.

C. Procedural Due Process

The Chicago ordinance affords the vehicle owner a preliminary hearing within 24 hours. The plaintiffs submit that the procedural component of federal due process is violated because the ordinance as written fails to give the owner adequate notice of this preliminary hearing. A timely notice of the right to contest the loss of a property interest is, they contend, an essential part of procedural due process.

The parties appear to agree that the use of one's automobile, even for a short period of time, is a property right protected by the Due Process Clause. See Sutton v. City of Milwaukee, 672 F.2d 644, 645 (7th Cir.1982). "The purpose of a preliminary hearing is for the hearing officer to decide whether 'there is probable cause to believe' both that the illegal items were found in the vehicle and that none of the three recognized defenses applies." Appellee's Br. at 7 (quoting Municipal Code of Chicago §§ 7-24-225(c), 8-20-015(c)). If the hearing officer concludes after the preliminary hearing that probable cause does not exist, the City must return the vehicle to the owner without charge. If the hearing officer determines that probable cause does exist, the vehicle must remain impounded pending a final hearing unless the owner posts a cash bond of $500 plus the towing and storage charges. An owner who does not request a preliminary hearing may obtain his vehicle by posting a bond.

The basic criteria for determining the adequacy of notice under the Due Process Clause are, as the parties agree, found in the seminal case of Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950). The Supreme Court, through the pen of Justice Jackson, required that the notice be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Id. at 314, 70 S.Ct. 652. Notably, the Court emphasized that, when notice is due to an individual, the "means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may

be defended on the ground that it is in itself reasonably certain to inform those affected, or, where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes." Id. at 315, 70 S.Ct. 652 (citations omitted). Our own Chief Judge, writing for this court, has noted that, when it comes to notice, due process requires "reasonable efforts at notice." Schluga v. City of Milwaukee, 101 F.3d 60, 62 (7th Cir.1996). Using reasonable efforts does not, of course, require that authorities use the best possible method of notification. See Mullane, 339 U.S. at 314, 70 S.Ct. 652; Schluga, 101 F.3d at 62.

In Mullane, the Court noted that "[i]t is part of the common prudence for all those who have an interest in (a thing), to guard that interest by persons who are in a situation to protect it." 339 U.S. at 316, 70 S.Ct. 652 (quoting The Mary, 9 Cranch 126, 144, 13 U.S. 126, 3 L.Ed. 678 (1815)) (internal quotation marks omitted). Therefore, under most circumstances, notice to the person to whom the article has been entrusted constitutes adequate notice because that person has a duty to let the owner know that the article "is being jeopardized." Id. (citing Ballard v. Hunter, 204 U.S. 241, 27 S.Ct. 261, 51 L.Ed. 461 (1907)). There seems to be little question, however, that authorities are expected to use the information readily available to them in determining whether to rely on a particular method of notification. See Robinson v. Hanrahan, 409 U.S. 38, 39, 93 S.Ct. 30, 34 L.Ed.2d 47 (1972); see also Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 798 n. 4, 103 S.Ct. 2706, 77 L.Ed.2d 180 (1983). Thus, they are under a duty to use the information in their possession to determine whether the

notice is reasonably calculated to reach the party who has the right to the notification. See Schluga, 101 F.3d at 63 (due process violation would result from failure to notify the real owner of the impending sale of his vehicle when the government knows who the real owner is, knows the record owner will not notify the real owner, and could notify the real owner by some inexpensive and efficacious means); see also Torres v. $36,256.80 U.S. Currency, 25 F.3d 1154, 1161 (2d Cir.1994); McKee v. Heggy, 703 F.2d 479, 481-82 (10th Cir.1983).

In this case, the person in possession of the vehicle, having been found by the police to be in possession of contraband drugs or of an unregistered firearm, may well be taken into custody or may, at that point, have an interest in not informing the owner of the vehicle of the circumstances surrounding the vehicle's impoundment. Cf. Mennonite Bd. of Missions, 462 U.S. at 799, 103 S.Ct. 2706 ("Notice to the property owner, who is not in privity with his creditor and who has failed to take steps necessary to preserve his own property interest, also cannot be expected to lead to actual notice to the mortgagee."). The City ought not be burdened, under all circumstances, by the driver's breach of duty to the owner. See Nelson v. City of New York, 352 U.S. 103, 108, 77 S.Ct. 195, 1 L.Ed.2d 171 (1956). However, to the extent that the authorities have altered significantly, by their arrest of the driver, the possibility of the owner's receiving prompt notice, the City might well have an obligation, depending on the "practicalities and peculiarities"[6] of the situation, to utilize

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6. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950).

other sources of information readily available to it to determine the identity of the owner and to give that individual notification of the preliminary hearing. See Williams v. United States Drug Enforcement Admin., 51 F.3d 732, 735 (7th Cir.1995).

The district court decided this matter on the pleadings and we therefore have a very meager record upon which to determine whether the procedures set forth in the ordinances provide a constitutionally adequate method of notification. We have sufficient misgivings about the comprehensiveness of the notice provisions in the ordinances to rest our decision on an alternate ground. We need not remand this case for additional proceedings on this point because the plaintiffs before us never alleged either that the officers lacked probable cause to believe the illegal objects were within the vehicles or that the plaintiffs could meet one of the exceptions to liability enumerated in the ordinances. Absent these allegations, there was nothing to contest at a preliminary hearing and therefore no deprivation of due process in its absence. See Gilbert v. Homar, 520 U.S. 924, 117 S.Ct. 1807, 1813-14, 138 L.Ed.2d 120 (1997); Northen v. City of Chicago, 126 F.3d 1024, 1026 (7th Cir.1997), cert. denied, __ U.S. __, 118 S.Ct. 1306, 140 L.Ed.2d 471 (1998); see also Codd v. Velger, 429 U.S. 624, 627-29, 97 S.Ct. 882, 51 L.Ed.2d 92 (1977).[7]

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7. In the course of their procedural due process arguments, the plaintiffs also submit that the City has violated their right under the Fourth Amendment to be free of unreasonable seizures. Counts VIII and IX of the complaint appear to allege that the City's seizures of the plaintiffs' vehicles were per se unreasonable because the (Cont'd)

(Cont'd)
seizures were carried out pursuant to municipal ordinances that themselves are violative of the plaintiffs' constitutional rights. On appeal, the plaintiffs' Fourth Amendment argument is that the nine-day delay between Ms. Towers' first attempt to retrieve her vehicle by paying the applicable fees and her actual retrieval of the vehicle rendered the seizure unreasonable.

Neither version of the plaintiffs' argument has merit. First, the plaintiffs have not alleged that the police officers lacked probable cause to seize the vehicles initially; rather, they contend that the unconstitutionality of the ordinances renders the seizures unreasonable. We agree with the district court that the plaintiffs' failure to state a claim that the ordinances are unconstitutional dooms their argument that the seizures were unreasonable because they were carried out pursuant to unreasonable ordinances.

The plaintiffs' second argument is precluded by Monell v. Department of Social Services, 436 U.S. 658, 691, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), which held that "a municipality cannot be held liable under § 1983 solely because it employs a tortfeasor." The plaintiffs have not sued the individual City employees whose alleged failure to complete paperwork caused the delay in returning Ms. Towers' vehicle to her; nor does the complaint allege that those employees' actions were taken pursuant to any policy or practice attributable to the City itself. The complaint states that "the City of Chicago, acting through its designated employees, had not 'completed the paperwork' necessary to return the car to Towers." R.22 at 9. Under Monell, the City cannot be held liable for the constitutional torts of its employees unless the employees' actions were pursuant to official municipal policy. The plaintiffs' complaint contains no allegation that the employees' actions in delaying the return of Ms. Towers' vehicle were pursuant to any policy or custom of the City. Therefore, the plaintiffs have not stated a claim against the City under § 1983 for violation of the Fourth Amendment.

Appendix A

Conclusion

Accordingly, the decision of the district court granting the motion to dismiss is affirmed.[8]

AFFIRMED.

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8. The plaintiffs' contention that the district court erred in denying the class certification is moot. See Inman v. Shalala, 30 F.3d 840, 844 n. 1 (7th Cir.1994); Chambers v. American Trans Air, Inc., 17 F.3d 998, 1006 (7th Cir.), cert. denied, 513 U.S. 1001, 115 S.Ct. 512, 130 L.Ed.2d 419 (1994); Price v. FCC Nat'l Bank, 4 F.3d 472, 475 (7th Cir.1993), cert. denied, 510 U.S. 1046, 114 S.Ct. 695, 126 L.Ed.2d 662 (1994).

APPENDIX B — MINUTE ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS DATED OCTOBER 29, 1997

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Michael W. Dobbins
CLERK

Office of the Clerk

Thomas M. Peters
Attorney at Law
343 South Dearborn Street
Suite 1400
Chicago, IL 60604

Case Number: 1:96-cv-06510

Other Court No: 96 CH 9337

Title: Towers v. Chgo, City of

Assigned Judge: Honorable Arlander Keys

MINUTE ORDER of 10/29/97 by Hon. Arlander Keys: Defendants Kapa and Torres' agreed motion to vacate minute order of 10/14/97 is granted. [70-1] The Court's order of 10/14/97 dismissing claims against defendants Kapa and Torres is stricken. The charges against said defendants are hereby reinstated. Mailed notice

This docket entry was made by the Clerk on October 30, 1997

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS DATED OCTOBER 14, 1997

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS

Name of Assigned Judge ARLANDER KEYS
or Magistrate Judge

* * *

Case Number 96 C 6510

Date October 14, 1997

Case Title Sandra Towers, et al v. City of Chicago, et al

* * *

MOTION:

* * *

Defendants Kapa and Torres' agreed motion to alter or amend judgment

DOCKET ENTRY:

☒ Filed motion of

* * *

Appendix C

☒ (Other docket entry) Defendants Kapa and Torres' Agreed Motion to Alter or Amend Judgment is granted. Specifically, the Court's September 30, 1997 Memorandum Opinion and Order, at n. 10, is amended to include dismissal of any and all claims that Plaintiff Kevin Amos asserted against Defendant Police Officers Christopher Kapa and Ignacio Torres.

* * *

s/ [illegible]
courtroom deputy's initials

* * * *

APPENDIX D — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION DATED SEPTEMBER 30, 1997

Sandra TOWERS, Robert Sturdivant, and Kevin Amos, individually and on behalf of all others similarly situated, Plaintiffs,

v.

CITY OF CHICAGO, Defendant.

No. 96 C 6510.

United States District Court,
N.D. Illinois,
Eastern Division.

Sept. 30, 1997.

* * *

MEMORANDUM OPINION AND ORDER

KEYS, United States Magistrate Judge.

This matter comes before the Court on Plaintiffs' Motion to Certify Class pursuant to Federal Rule of Civil Procedure 23, Plaintiffs' Motion for Preliminary Injunction, and Defendant's Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). For the following reasons, Plaintiffs' Motion to Certify Class, and Plaintiffs' Motion for Preliminary Injunction are denied, and Defendant's Motion to Dismiss is granted.

Appendix D

PROCEDURAL HISTORY

On August 30, 1996, Plaintiff, Sandra Towers, filed suit against Defendant, City of Chicago (the "City"), in state court, seeking a common law writ of certiorari to contest the final order of the City's administrative hearing officer and alleging violations of 42 U.S.C. § 1983 ("§ 1983"). The City petitioned to remove the case to this Court, under federal question jurisdiction pursuant to 28 U.S.C. § 1441(b) & (c), and § 1446. On January 27, 1997, Ms. Towers filed her Second Amended Complaint ("Complaint") which added two additional Plaintiffs, Robert Sturdivant and Kevin Amos.

BACKGROUND FACTS

I. Facts Relating to Plaintiff Towers

On January 27, 1996, the City seized and impounded Ms. Towers' car pursuant to Chicago Municipal Code § 7-24-225, which authorizes the seizure of a vehicle that arresting officers have probable cause to believe contains a controlled substance. (Complaint at Count III, ¶¶ 7, 10, 14, 15.) At that time, Ms. Towers' car was being operated by her acquaintance, Ray Chambers, without her "express permission." (Complaint at Count III, ¶¶ 8-9.) When police officers stopped and searched the car, they found a controlled substance on a passenger in the car and, therefore, impounded the vehicle. (Complaint at Count III, ¶¶ 10, 15, 16.) Ms. Towers was not present when her car was searched or seized, nor had she given anyone, including Mr. Chambers, permission to transport controlled substances in her car. (Complaint at Count I, ¶ 3; Count III, ¶¶ 11-12.)

Appendix D

The following day, even though Ms. Towers had the appropriate paperwork and monies due, the City did not release her car to her because it had not yet completed the necessary paperwork. (Complaint at Count III, ¶¶ 19-20.) Ms. Towers attempted to retrieve her car from the City between January 28 and February 6, 1996. (Id.) However, at no time was she given notice of her right to demand a preliminary hearing, and, for that reason, she did not request such hearing.[1] (Complaint at Count I, ¶ 6; Count III, ¶ 18.) Ms. Towers finally retrieved her car after paying a $500 cash bond and $225 for towing and storage fees. (Complaint at Count III, ¶¶ 21, 22, 28.)

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1. Each of the City's ordinances challenged in the Complaint, under which vehicles are impounded, include provisions for a preliminary hearing on the probable cause for the seizure, followed by written notice of the right to a final administrative hearing within 30 days. Notice of the violations, and of the owner's right to request a preliminary hearing, is given verbally to the person in control of the vehicle at the time of seizure. Chicago Municipal Code § 11-4-1115(c)(3) (sound violations for excessive noise) provides that:

> [w]henever the owner of a vehicle seized pursuant to this section requests a preliminary hearing within 12 hours after the seizure, a hearing officer of the City shall conduct such preliminary hearing within 24 hours after the seizure, excluding Sundays and holidays.

Section 8-20-015(c) (illegal firearms violations) contains the same provision, except that the request for preliminary hearing must be made within 12 hours, both in person, and in writing. Section 7-24-225(c) (controlled substances violations) requires the request for a preliminary hearing to be received within 24 hours and made in writing.

Appendix D

On or about February 2, 1996, Ms. Towers received a letter notifying her of her right to a final hearing, at which she could contest the fees and costs of impoundment. (Complaint at Count III, ¶ 23.) At the hearing, pursuant to Chicago Municipal Code § 7-24-225, Ms. Towers was precluded from entering an innocent-owner defense because none of the ordinance's available defenses applied to her situation.[2] (Complaint at Count III, ¶¶ 23, 25.) Consequently, on March 8, 1996, a final administrative order was entered against Ms. Towers. (Complaint at Count I, ¶ 15.)

II. Facts Relating to Plaintiff Sturdivant

In September of 1996,[3] Chicago police officers seized and impounded Mr. Sturdivant's car under Chicago Municipal Code § 8-20-015, which provides for the imposition of fines and fees against registered owners of automobiles that contain an unregistered firearm. (Complaint at Count II, ¶¶ 7-10.) A person, not Mr.

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2. Under the ordinance, a registered owner can defend on three grounds only: (a) the vehicle used in the violation was stolen at the time and the theft was reported to the appropriate police authorities within 24 hours after the theft was discovered or reasonably should have been discovered; (b) the vehicle was being operated as a common carrier and the violation occurred without the knowledge of the person in control of the vehicle; or (c) the presence of the controlled substance and/or cannabis was authorized under the Controlled Substance Act and/or the Cannabis Control Act. (Complaint at Count III, ¶ 25.)

3. No specific date is provided in the Complaint.

Sturdivant, was in Mr. Sturdivant's car and possessed a firearm at the time of the violation.[4] (Complaint at Count II, ¶ 9.) Like Ms. Towers, Mr. Sturdivant was never notified by the City of his right to request a preliminary hearing, and did not request one. (Complaint at Count II, ¶ 11.) On or about October 1, 1996, Mr. Sturdivant received notice of his right to a final hearing concerning the impoundment of his car. (Complaint at Count II, ¶ 12.) Pursuant to Chicago Municipal Code § 8-20-015, Mr. Sturdivant was precluded from asserting his innocent-owner defense at a final hearing because no such defense is permitted under the ordinance.[5] Because Mr. Sturdivant cannot avail himself of any of the defenses provided by the ordinance, he "will lose the hearing. . . ." (Complaint at Count II, ¶¶ 14-15.)[6] Further, because he was unable to pay the $500 cash bond, and additional towing and storage fees, he could not use his vehicle for approximately fifteen days. (Complaint at Count II, ¶¶ 20-21.)

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4. It is unclear from the pleadings whether Mr. Sturdivant was anywhere near his vehicle at the time of the violation.

5. The only defenses available to defendants under Chicago Municipal Code § 8-20-015 are: (a) the vehicle used in the violation was stolen at that time and the theft was reported to the appropriate police authorities within 24 hours after the theft was discovered or reasonably should have been discovered; (b) if the vehicle is operating as a common carrier and the violation occurs without the actual knowledge of the person in control of the vehicle; or (3) the owner proves that the presence of the firearm was permissible. (Complaint at Count II, ¶ 13.)

6. Mr. Sturdivant does not allege that, at the time of the filing of the Complaint, he had attended any final hearing or that any final judgment had been entered against him.

Appendix D

III. Facts Relating to Plaintiff Amos

On October 29, 1996, Mr. Amos was seated inside his automobile, with his windows rolled up, at a gas station. (Complaint at Count X, ¶¶ 8-10.) He was counting his gas money and playing his car radio. (Id. at ¶ 10.) Two Chicago police officers ordered Mr. Amos out of his car, searched him, and searched his vehicle. (Complaint at Count II, ¶¶ 11-13.) No contraband was found on his person or in his car. (Complaint at Count II, ¶ 14.)

The officers charged Mr. Amos with violating sound device restrictions for playing his radio too loudly, pursuant to Chicago Municipal Code § 11-4- 1115(c). (Complaint at Count II, ¶¶ 15-16.) The officers then seized his vehicle, and gave him a date to appear in traffic court on that charge. (Complaint at Count II, ¶¶ 15-16.) The officers also gave Mr. Amos notice of his right to request a preliminary hearing to contest probable cause. (Complaint at Count II, ¶¶ 19-20.)

At the preliminary hearing, on the day following impoundment, Mr. Amos appeared, but the arresting officers did not; the hearing officer concluded that there was sufficient probable cause to hold his automobile. (Complaint at Count II, ¶¶ 19-20.) At the time of the filing of the Complaint, Mr. Amos had not received notice of his final hearing. (Complaint at Count II, ¶ 21.)[7] Mr. Amos was

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7. Plaintiff does not differentiate between the date police officers gave him at the time they seized his automobile, and receipt of final notice. It is the Court's understanding that the date given to him by the police officers to contest the violation in traffic court, and notice of his final hearing, may represent notice for the same hearing.

unable to pay the $500 fine pursuant to the statute, for "many days." (Complaint at Count II, ¶ 22.)

DISCUSSION

I. Defendant's Motion to Dismiss

Pursuant to Federal Rule of Civil Procedure 12(b)(6), a motion to dismiss for failure to state a claim upon which relief can be granted tests the legal sufficiency of the complaint. Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-02, 2 L.Ed.2d 80, (1957); Chicago Dist. of Carpenters Pension Fund v. G & A Installations, Inc., No. 95 C 6524, 1996 WL 66098, at *1 (N.D.Ill. Feb.8, 1996). The Court must determine whether the plaintiffs would be entitled to relief under any set of facts that could be established in support of their claim. Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S.Ct. 2229, 2232-33, 81 L.Ed.2d 59 (1984). In deciding a Rule 12(b)(6) motion, the court accepts as true all well-pled factual allegations in the complaint, and draws all reasonable inferences therefrom in the plaintiffs' favor. Lashbrook v. Oerkfitz, 65 F.3d 1339, 1343 (7th Cir.1995); Conley, 355 U.S. at 45-46, 78 S.Ct. at 101-02. The court will dismiss the complaint only when it appears beyond doubt that the plaintiffs have alleged no facts which, if proved, would entitle them to relief. Id.; Chaney v. Suburban Bus Div. of Regional Transp. Auth., 52 F.3d 623, 627 (7th Cir.1995).

A. Count I: Ms. Towers' Common Law Writ of Certiorari

Ms. Towers seeks a common law writ of certiorari for review of the final order of the administrative hearing held

on February 22, 1996.[8] Under Illinois law, state courts may issue common law writs of certiorari to an inferior administrative tribunal, if that tribunal has exceeded its jurisdiction, or proceeded illegally, and no direct appeal or review of its proceedings is available. Goodfriend v. Board of Appeals of Cook County, 18 Ill.App.3d 412, 305 N.E.2d 404, 409 (1973); see Holstein v. City of Chicago, 29 F.3d 1145, 1148 (7th Cir.1994) (recognizing defendant's right to seek review of municipality's administrative decision by state circuit court under writ of certiorari, citing Graff v. City of Chicago, 9 F.3d 1309, 1325 (7th Cir.1993), cert. denied, 511 U.S. 1085, 114 S.Ct. 1837, 128 L.Ed.2d 464 (1994)).

The reviewing court cannot examine extrinsic evidence absent statutory authorization. Goodfriend, 305 N.E.2d at 410. Nor can it weigh evidence or substitute its judgment for the discretion and judgment of the administrative agency. Quinlan and Tyson, Inc. v. City of Evanston, 25 Ill.App.3d 879, 324 N.E.2d 65, 74 (1975). A reviewing court can, however, examine all questions of fact and law contained in the record, including a de novo review of any constitutional issues. Holstein, 29 F.3d at 1148 (citing Howard v. Lawton, 22 Ill.2d 331, 175 N.E.2d 556 (1961)). Under Illinois law, a plaintiff seeking administrative review on constitutional grounds must raise those issues at the "earliest opportunity." Head-On Collision Line, Inc. v. Kirk,

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8. Mr. Sturdivant and Mr. Amos do not join Ms. Towers' Petition for a Common Law Writ of Certiorari. The pleadings indicate that neither Mr. Sturdivant nor Mr. Amos had attended a final hearing or received a final administrative order concerning their alleged violations of the City's ordinances.

36 Ill.App.3d 263, 343 N.E.2d 534, 538 (1976). Generally, a reviewing court should not interfere with an administrative body's discretionary authority, unless exercise of it is arbitrary and capricious, or such action is against the manifest weight of the evidence. Hanrahan v. Williams, 174 Ill.2d 268, 220 Ill.Dec. 339, 342, 673 N.E.2d 251, 254 (Ill.1996), petition for cert. filed, 65 U.S.L.W. 3799 (U.S. Mar. 3, 1997) (No. 96-1860).

The gravamen of Ms. Towers' claim is that she was denied a preliminary hearing and the opportunity to plead her innocence at the final hearing. Ms. Towers does not allege that the legal standard was misapplied to the facts of her case, nor that the administrative tribunal acted capriciously, arbitrarily or illegally. As addressed below, the Court finds that the City's procedures, regarding Plaintiffs' § 1983 claims, did not (as applied), and do not (facially), violate the Due Process Clause of the Fourteenth Amendment. Accordingly, Ms. Towers' claim for Common Law Writ of Certiorari in Count I is dismissed.[9]

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9. In the first of a series of inauspicious arguments, the City argues that Plaintiffs dismissed supplemental jurisdiction for Count I under 28 U.S.C. § 1367 in their footnote expanding upon a paragraph discussing Counts II-XIV. (Pls.' Resp., at 6 n. 3.) The Court does not read this section of Plaintiffs' memorandum to include any expression of their intent to dismiss Count I.

Second, the City erroneously contends that the Court lacks subject matter jurisdiction over Count I because all § 1983 counts fail to state a claim. However, the City overlooks the fact that it, and not Ms. Towers, removed this case to federal court for subject

(Cont'd)

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B. Counts II through IX, XI and XIII: § 1983 Claims

Section 1983 provides a cause of action for persons deprived of constitutionally protected rights. Specifically, § 1983 imposes liability on those persons who, acting under color of state authority, deprive another of a right secured by the Fourteenth Amendment. Adickes v. S.H. Kress & Co., 398 U.S. 144, 152, 90 S.Ct. 1598, 1605-06, 26 L.Ed.2d 142 (1970). Congress passed § 1983 " 'for the express purpose of 'enforc[ing] the Provisions of the Fourteenth Amendment.' ' " Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922, 934, 102 S.Ct. 2744, 2752, 73 L.Ed.2d 482 (1982) (quoting Lynch v. Household Finance Corp., 405 U.S. 538,

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matter jurisdiction over the § 1983 claims pursuant to 28 U.S.C. §§ 1441 and 1446. (Def.'s Pet. For Removal, at 1.) In the same vein, the City also reasons that Plaintiffs' § 1983 claims are supplemental to Plaintiff's Common Law Writ of Certiorari, under Count I. (Def.'s Reply, at 3.) The reverse is true. Therefore, Ms. Towers' Common Law Writ of Certiorari, under Count, I is before the Court under supplemental jurisdiction.

Lastly, the City argues that Ms. Towers waived her right to assert any constitutional claims by failing to present them at the earliest possible time. (Def.'s Reply Mem., at 3-5.) On the contrary, the record clearly illustrates that Ms. Towers has stated her constitutional claims at every step of this litigation from the start. (See, e.g., Def.'s Pet. for Removal, at Ex. A.)

Therefore, the Court rejects the City's argument that Ms. Towers waived her right to petition for common law writ of certiorari by voluntarily dismissing all supplemental claims under 28 U.S.C. § 1367.

545, 92 S.Ct. 1113, 1118-19, 31 L.Ed.2d 424 (1972) (quoting Cong. Globe, 42 Cong., 1st Sess., App. 69 (1871))).

To state a claim under § 1983, a plaintiff must allege a violation of a federal right. Wright v. Roanoke Redevelopment and Hous. Auth., 479 U.S. 418, 431-32, 107 S.Ct. 766, 774-75, 93 L.Ed.2d 781 (1987); Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 19, 101 S.Ct. 2615, 2625-26, 69 L.Ed.2d 435 (1981). Municipalities are liable under § 1983 for actions or policies which are found to be either unconstitutional or illegal. Monell v. Department of Soc. Servs., 436 U.S. 658, 660, 98 S.Ct. 2018, 2020, 56 L.Ed.2d 611 (1978). However, a municipality's liability is limited to those acts which it has "officially sanctioned or ordered." Pembaur v. City of Cincinnati, 475 U.S. 469, 480, 106 S.Ct. 1292, 1298, 89 L.Ed.2d 452 (1986).

In the Complaint, Plaintiffs allege that the City deprived them of their federally protected constitutional rights by enforcing various vehicle seizure ordinances. Counts II, III, VI, VII, and XI assert due process violations under the Fourteenth Amendment; Counts IV, V, and XIII assert violations of the Excessive Fines Clause of the Eighth Amendment, made applicable to the states by the Fourteenth Amendment; Counts VIII and IX assert unreasonable seizures under the Fourth Amendment, made applicable to the states by the Fourteenth Amendment; and Count XIV asserts a class action claim for Counts II-VI, XI and XIII.[10]

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10. The City's Motion to Dismiss for failure to state a claim under Rule 12(b)(6) does not include Counts X and XII of the Complaint. However, for the reasons set forth below, said Counts are also dismissed.

Appendix D

For the reasons set forth below, all of Plaintiffs' claims are dismissed for failure to state a claim on which relief can be granted.

1. Counts II, III, VI, VII and XI: Fourteenth Amendment Due Process Claims

Plaintiffs allege that the City's ordinances, as "written and enforced," violate the Due Process Clause of the Fourteenth Amendment, because none provide for a prompt post-deprivation hearing, and because they preclude plaintiffs from asserting an innocent-owner defense during administrative hearings. Because these Counts contain both procedural and substantive due process claims, the Court will address each in turn.[11]

a. Procedural Due Process Analysis

Procedural due process prohibits the government from taking some action, which directly impairs a person's property interests, before a hearing is held during which the affected person may be heard. Mathews v. Eldridge, 424 U.S. 319, 332, 96 S.Ct. 893, 901, 47 L.Ed.2d 18 (1976).

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11. The City argues that Plaintiffs have only asserted facial challenges, to the constitutionality of its ordinances, for failure to provide procedural due process. (Def.'s Resp. to Sur-Reply, at 4.) viewing it in a light most favorable to the Plaintiffs, this Court reads Plaintiffs' Complaint as asserting both facial and as applied challenges with regard to procedural and substantive due process violations. However, this distinction does not impact the result of the Court's constitutional analysis of the City's challenged ordinances.

The focus of this analysis is, therefore, on the hearing process, and not on the fairness of the rule. Because due process is a flexible concept, its procedural protections vary depending on the particular right being deprived. Morrissey v. Brewer, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484 (1972).

To determine whether a challenged process adequately protects a federal right, the court must weigh three factors initially laid out in Mathews: (1) the type and importance of the private interest affected by the government action, including the duration and permanence of deprivation; (2) the risk of erroneously depriving such interest under the challenged procedures, and the "probable value . . . of additional or substitute procedural safeguards; and (3) the governmental function involved and state interests served by such procedures, as well as the administrative and fiscal burdens, if any, that would result from the substitute procedures sought. Miller v. City of Chicago, 774 F.2d 188, 192 (7th Cir.1985), cert. denied, 476 U.S. 1105, 106 S.Ct. 1949, 90 L.Ed.2d 358 (1986) (citing Mathews, 424 U.S. at 335, 96 S.Ct. at 903; Logan v. Zimmerman Brush Co., 455 U.S. 422, 434, 102 S.Ct. 1148, 1156-57, 71 L.Ed.2d 265 (1982)).

For the first Mathews factor, Plaintiffs have a protected property interest in the use of their automobiles under § 1983. Sutton v. City of Milwaukee, 672 F.2d 644, 645-46 (7th Cir.1982). Because this property interest includes the use of the automobiles, and because "[a]utomobiles occupy a central place in the lives of most Americans, providing access to jobs, schools, and recreation as well as to the daily

necessities of life," Plaintiffs have a substantial interest in a prompt hearing on whether seizures of the vehicles were conducted with probable cause. Coleman v. Watt, 40 F.3d 255, 261 (8th Cir.1994).

Under the second Mathews factor, the risk of wrongful deprivation, due to procedural faults, is minimal here. Plaintiffs' constitutional right to procedural due process is protected by the procedures employed by the City and the review procedures provided under Illinois and local laws. Under the challenged ordinances, an individual cited for a violation has notice of, and a right to, a preliminary post-deprivation hearing. (See Chicago Municipal Code §§ 7-24-225(c), 8-20-015(c) and 11-4-1115(c)(3), supra n. 1.) Additionally, a person has notice of, and a right to, a final hearing. (Complaint at Count II, ¶ 12.) These post-deprivation hearings are adequate to remedy the wrongful deprivations of vehicles. See Holstein, 29 F.3d at 1148 (citing Kauth v. Hartford Ins. Co. of Ill., 852 F.2d 951, 955-56 (7th Cir.1988)).

Furthermore, if the vehicle owner is unhappy with the administrative decision, he or she may petition the Illinois circuit courts for a common law writ of certiorari, to review the findings of a municipality's administrative body. Graff, 9 F.3d at 1325. Finally, if the owner is able to prove that such an administrative hearing is illusory or futile, he or she can bring a state court action for replevin.[12] Holstein, 29 F.3d at 1148 (citation omitted).

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12. Under the facts presented in this case, Ms. Towers would have been able to bring an action for replevin, in state court, under

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Appendix D

Plaintiffs argue that their right to a preliminary hearing is illusory because the City has no method of notifying those owners who are not in possession of their cars at the time of seizure. (Plaintiffs' Response, at 23.) The City, however, is not obligated to locate and notify every registered owner. Rather, it must use procedures "reasonably calculated" to notify the owner. Robinson v. Hanrahan, 409 U.S. 38, 40, 93 S.Ct. 30, 31-32, 34 L.Ed.2d 47 (1972). Each of the challenged ordinances requires the ticketing police officer to give notice of the owner's rights. This notice can be given to the person identifying himself as the owner, or the person

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735 ILL. COMP. STAT. 5/19-101 et seq. (West's 1993 & Supp.1997). Replevin is an action whereby an owner, who is entitled to possession of goods or chattels, may recover them from one who has wrongfully detained them. Jim's Furniture Mart, Inc. v. Harris, 42 Ill.App.3d 488, 1 Ill.Dec. 175, 356 N.E.2d 175, 176 (1976). A plaintiff in a replevin action must give the defendant five days' written notice of the state court hearing. 735 ILL. COMP. STAT. 5/19-106. At the hearing, the plaintiff must prove a "superior right to possession of the disputed property," and show a likelihood of prevailing on his or her claim to possession. Id. at 5/19-107.

Ms. Towers could have brought an action in replevin and argued that, by delaying the return of her vehicle, despite her willingness and ability to pay, the City wrongfully detained her property. In addition to receiving her car, Ms. Towers could also have been awarded damages caused by any wrongful delay. Id. at 5/19-125.

Because Ms. Towers has not brought an action in replevin, the issue of the merits of such action are not before the Court in the case at bar, and, therefore, are not subject to review.

in control of the vehicle, at the time of the alleged violation and seizure. The Court finds that this practice is reasonably calculated to notify owners of their rights.

Contrastingly, in Coleman, 40 F.3d at 261, the Eighth Circuit pronounced that a seven day delay in notifying a registered owner about the seizure of his car was excessive and constituted a procedural due process violation. The crux of the Eighth Circuit's analysis was that, even though "[t]he risk of erroneous deprivation is neither increased nor decreased by the timing of the postdeprivation hearing . . . . a more expeditious hearing would significantly reduce the harm suffered by owners wrongly deprived of the use of their vehicles." Coleman, 40 F.3d at 261.

The parties dispute whether Plaintiffs truly had access to a preliminary, post-deprivation hearing. Plaintiffs cite several cases to demonstrate that the City's final hearing, thirty days after the seizure occurred, is too far delayed to provide due process.[13] Plaintiffs argue that, because they

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13. Plaintiffs cite Coleman, 40 F.3d 255 (hearing after seven-day delay is unconstitutional); Goichman v. City of Aspen, 859 F.2d 1466 (10th Cir.1988) (hearing within forty-eight hours of demand is constitutional); DeFranks v. Mayor of Ocean City, 777 F.2d 185 (4th Cir.1985) (one day's notice and hearing within twenty-four hours of demand is constitutional); Cokinos v. District of Columbia, 728 F.2d 502 (D.C.Cir.1983) (hearing within twenty-four hours is constitutional); Goichman v. Rheuban Motors, Inc., 682 F.2d 1320 (9th Cir.1982) (hearing after forty-eight hours is constitutional); and Stypmann v. City and County of San Francisco, 557 F.2d 1338 (9th Cir.1977) (hearing after five days is unconstitutional). (Pls.' Resp. to Def.'s Mot. to Dismiss, at 23-24.)

did not receive notice of their right to a preliminary hearing, the first and only post-deprivation hearing to which they are entitled under the ordinances becomes the final hearing before the administrative hearing officer. Plaintiffs further argue that, because these hearings occur thirty days after the City impounds a vehicle, an innocent owner is wrongly denied use of his vehicle for a prolonged period.

The City, on the other hand, contends that, because the preliminary hearing is available within twenty-four hours of the seizure, it, and not the final hearing, is the true measure of the delay in receiving a hearing. The City argues that, because these hearings occur within twenty-four hours from the time of impoundment, there is no constitutional violation. The City's policy under the ordinances is similar to that in Breath v. Cronvich, 729 F.2d 1006 (5th Cir.1984), cert. denied, 469 U.S. 934, 105 S.Ct. 332, 83 L.Ed.2d 268 (1984). In that case, the Fifth Circuit upheld the constitutionality of an appearance bond procedure, coupled with a hearing on the underlying traffic violations within a reasonable time. Id. at 1011. Similarly, in this case, in addition to the preliminary hearing within twenty-four hours, the City permits owners to pay a $500 bond to retrieve their vehicles for normal use until the final hearing before an administrative hearing officer.[14] Plaintiffs cite to no

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14. Under each ordinance, at the final hearing, the hearing officer determines, by a preponderance of the evidence, whether the ordinance was violated. See, e.g., Chicago Municipal Code § 7-24-225(d)-(e). If the hearing officer finds that the ordinance was violated, the City will either: keep the posted $500 bond as payment for the fine; hold the vehicle until the fine is paid; or sell

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authority holding that this practice lacks adequate due process protections. Cf. Breath, 729 F.2d at 1006; Goichman v. Rheuban Motors, Inc., 682 F.2d 1320 (9th Cir.1982) (holding due process does not require city to release cars to owners under bond pending hearing on merits of traffic violation) Clearly, these provisions, and the state and local remedies, provide adequate procedural due process protections.

Finally, as to the last prong of the Mathews analysis, Plaintiffs offer no substitute procedures other than a decree enjoining the City from impounding vehicles of allegedly innocent owners. While the Court is sympathetic to the plight of truly innocent owners faced with such a burden, it cannot overlook the governmental functions involved in, and the state interests served by, the enforcement of Chicago Municipal Code §§ 7-24-255 and 8-20-015. The City has a substantial interest in removing from the streets automobiles which are being used to transport illegal weapons or drugs. See, e.g., Miller, 774 F.2d at 193 (holding district court erred in its Mathews analysis by according no weight to defendant's interest in removing vehicles from the streets).

After balancing the three Mathews factors, it is evident that the City has not denied Plaintiffs due process. Therefore, the City's post-deprivation procedures under the

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the vehicle, and apply the proceeds to the fine and costs, before returning the remaining monies to the registered owner. See § 7-24-225(d)-(e). The City sells the vehicle only when the period allowed for judicial review expires, or when judicial review results in a finding for the City. § 7-24-225(f).

challenged ordinances, coupled with Plaintiffs' rights to petition the state circuit courts for common law writs of certiorari, and to pursue actions in replevin, adequately protect Plaintiffs' Fourteenth Amendment Procedural Due Process rights.[15]

i. Mr. Amos' Claims

Mr. Amos did not plead that he had inadequate notice at any time before his preliminary or final hearings. Nor does he plead that he was denied a final hearing. Instead, he states that he was given notice of his right to a preliminary hearing, and that he "has not yet received notice of his final hearing." (Complaint, at Count X, ¶¶ 19-20.) Simply because he has not "yet" received his notice, does not mean that a final hearing was held without notice thereof. Alternatively, Mr. Amos may have received notice of a date to appear to contest his citation in traffic court when he initially received that citation from the police officers on October 29, 1996. In that event, Mr. Amos cannot assert that he was never notified, and therefore, denied due process. As such, Mr. Amos fails to allege that he was denied procedural due process by the City.

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15. Even if Plaintiffs had, arguendo, asserted a due process claim because they were denied a pre-deprivation hearing, that claim too would have failed. See, e.g., Holstein, 29 F.3d at 1148 (finding Due Process Clause does not require a pre-deprivation hearing for owners of parked cars before towing; citing Sutton v. City of Milwaukee, 672 F.2d 644 (7th Cir.1982)).

ii. Ms. Towers' Claims

At some point after the seizure of her automobile, Ms. Towers became aware of the fact that her car had been impounded. Ms. Towers does not allege that the City did not notify Mr. Chambers, the driver of the car at the time of seizure (as it is required to do under § 7-24-225(c)). Rather, she alleges that, because the City did not inform her directly of her right to a preliminary hearing, she was unable to request a preliminary hearing, and was, therefore, denied due process.

Although short of Ms. Towers' standard for notice, the City is only required to give notice "reasonably calculated" to apprise an individual of his or her rights. Robinson, 409 U.S. at 40, 93 S.Ct. at 31-32. The City's ordinances comport with this standard by requiring its police officers, at the time of a violation, to provide notice to the person who is in control of the vehicle. The City is not required to ensure that every registered owner is personally notified of his or her right to a proceeding.

As illustrated above, the City provided Ms. Towers with the requisite procedural due process protections under the Constitution. For those reasons, Ms. Towers fails to state a claim upon which relief can be granted.

iii. Mr. Sturdivant's Claims

Because Mr. Sturdivant's claims for procedural due process are the same as those asserted by Ms. Towers, he

too has failed to state a claim upon which relief can be granted.[16]

b. Substantive Due Process Analysis

Substantive due process guarantees that the essential purpose of a law or governmental action is compatible with the Constitution. Therefore, the fairness of the rule at hand is scrutinized, not the fairness of the decision-making process through which it is applied.

Plaintiffs also allege that the City's ordinances permit fines, constituting a criminal penalty of $500 (plus the towing and storage fees), while simultaneously denying an innocent-owner defense to those individuals appearing to contest the fines. The City contends that the ordinances are not criminal in nature and that, as a civil penalty, the fines are constitutional. As developed below, the City's

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16. The City argues that, because Mr. Sturdivant had not yet availed himself of his final hearing, he lacks standing to challenge the City's ordinance, and that his claim is not ripe for adjudication. The City's contention is unfounded. To require Mr. Sturdivant to gain standing by forcing him to attend a final hearing, where his sole defense is precluded by the ordinance, would serve no legitimate purpose. See, e.g., Sierra Club v. Marita, 46 F.3d 606, 612 (7th Cir.1995) ("unless a plaintiff's purported interest in the matter is wholly speculative, waiting any longer to address that injury makes little sense."); Triple G Landfills, Inc. v. Board of Comm'rs of Fountain County, Ind., 977 F.2d 287, 291 (7th Cir.1992) ("ripeness doctrine requires a live, focused case of real consequence to the parties. It does not require [plaintiff] to jump through a series of hoops, the last of which [he or she] is certain to find obstructed by a brick wall.")

ordinances are analogous to civil in rem forfeiture actions, and do not levy criminal fines. As such, the Court finds that the City's ordinances prescribe constitutionally permissible civil fines.[17]

The City's fines are analogous to civil in rem forfeitures. In Bennis v. Michigan, 516 U.S. 442, 116 S.Ct. 994, 134 L.Ed.2d 68 (1996), the Supreme Court upheld the constitutionality of a Michigan in rem forfeiture statute, as

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17. Plaintiffs also allege that due process was denied because they were unable to cross-examine police officers at the hearings, and that the hearings themselves were conducted by the City's own biased hearing officers. Primarily because these assertions rest on the premise that the ordinances are criminal in nature, they fail to state a claim under the Due Process Clause of the Fourteenth Amendment.

First, for the reasons set out in this Opinion, the challenged ordinances are civil, not criminal, in nature. Second, there is no absolute right to confront police officers who issue citations for violations of the City's ordinances. Van Harken v. City of Chicago, 103 F.3d 1346, 1352 (7th Cir.) cert. denied, __ U.S. __, 117 S.Ct. 1846, 137 L.Ed.2d 1049 (1997) (finding no absolute right in parking violations hearing to cross-examine ticketing officers). Third, Plaintiffs cannot assume that the City's hearing officers endeavor to "maximize the City's 'take' " during the hearings. Van Harken, 103 F.3d at 1352. (finding that the "adjudicative reliability of hearing officers is not fatally compromised" due to their employment relationship with the defendant).

Therefore, Plaintiffs arguments that they were denied due process at the administrative hearings fail to state a claim upon which relief can be granted.

it applied to innocent owners of seized property.[18] In Bennis, the plaintiff contended, inter alia, that she was denied her property interest without the due process protections of the Fourteenth Amendment, because she was denied notice or an opportunity to contest the forfeiture. Id. at __, 116 S.Ct. at 997. The plaintiff claimed that she was entitled to assert that she was an innocent owner, and that she had entrusted the car to her husband, who, unbeknownst to her, used it to violate Michigan's indecency laws (prostitution). Id.

The Supreme Court reviewed a "long, unbroken line" of cases upholding in rem forfeiture actions against innocent owners as constitutional. The Supreme Court drew a distinction between two specific situations: (1) where a vehicle is used by another without the owner's consent; and (2) where a vehicle is used by another with the owner's consent, but, for a purpose to which the owner did not consent. Bennis, 516 U.S. at __ - __ n. 5, 116 S.Ct. at 998-99 n. 5. Because the plaintiff in Bennis fell into this latter group, the Supreme Court held that her interests were not protected by the Due Process Clause of the Fourteenth Amendment against an in rem forfeiture action. Id. at __, 116 S.Ct. at 999. Excerpts from two of the cited cases are particularly illustrative of this distinction:

> Cases often arise where the property of the owner is forfeited on account of the fraud, neglect, or

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18. In Bennis, the police found plaintiff's husband engaging in a sexual act, with a prostitute, in the family car. During the ensuing civil forfeiture in rem action against the car, the wife's lack of knowledge that the car would be used in a proscribed manner was not an available defense. Bennis, 516 U.S. at __, 116 S.Ct. at 997.

> misconduct of those intrusted with its possession, care and custody, even when the owner is otherwise without fault . . . and it has always been held . . . that the acts of [the possessors] bind the interest of the owner . . . whether he be innocent or guilty.

Id. at __, 116 S.Ct. at 998 (quoting Dobbins' Distillery v. United States, 96 U.S. 395, 401, 24 L.Ed. 637 (1877)).

> It is not unknown or indeed uncommon for the law to visit upon the owner of property the unpleasant consequences of the unauthorized action of one to whom he has entrusted it. . . . [Many areas of law] suggest that certain uses of property may be regarded as so undesirable that the owner surrenders his control at his peril. . . .

Id. (Quoting Van Oster v. Kansas, 272 U.S. 465, 467-68, 47 S.Ct. 133, 134, 71 L.Ed. 354 (1926)).

The plaintiff in Bennis further argued that, notwithstanding the precedent of the in rem forfeiture cases, the Supreme Court should have required some level of culpability before ordering the forfeiture. Id. at __, 116 S.Ct. at 1000. In support of her argument, she cited Austin v. United States, 509 U.S. 602, 113 S.Ct. 2801, 125 L.Ed.2d 488 (1993).[19] She argued that, because the excessive fines

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19. In Austin, the Supreme Court held that the Eighth Amendment's Excessive Fines Clause applies to civil in rem (Cont'd)

clause was extended to protect the property interests of a convicted criminal, it is unreasonable to omit a requirement for some culpability in civil forfeiture actions against innocent owners. Bennis, 516 U.S. at __, 116 S.Ct. at 1000. The Supreme Court rejected her argument because Austin did not concern an innocent owner defense, "other than to point out that if a forfeiture statute allows such a defense, the defense itself is 'punitive' in motive." Id.

In the case at bar, Plaintiffs raise the same arguments as did the plaintiff in Bennis. Because the circumstances in that case are analogous to this matter, the Court finds Bennis controlling here, and rejects Plaintiffs' arguments.

When the dust clears, Plaintiffs are left with a $500 fine (read "forfeiture") on their property because they, wrongfully or not, authorized others to use their automobiles. Under the City's ordinances, if they are unable to pay this fine, the automobile is sold by the City to pay the fine, and the remainder is returned to the registered owner.[20] Unlike Bennis, however, the City's procedures limit the forfeiture to $500 in every case, and do not require

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(Cont'd)
forfeiture actions, when the purpose of those proceedings was, in part, to punish. Austin, 509 U.S. at 622, 113 S.Ct. at 2812. Richard Austin was sentenced to seven years' imprisonment for possessing cocaine with an intent to distribute. In addition to the sentence, the government then filed an in rem forfeiture action to seize his mobile home and auto body shop. Austin, 509 U.S. at 604, 113 S.Ct. at 2803.

20. See supra n. 14.

forfeiture of the entire automobile, nor a percentage thereof.[21]

On a separate, but related argument, Plaintiffs allege that the City's ordinances are criminal, and therefore are subject to criminal due process protections. Contrary to Plaintiffs' assertions, however, the City's ordinances and fines are not criminal in nature. In United States v. Ward, 448 U.S. 242, 248, 100 S.Ct. 2636, 2641, 65 L.Ed.2d 742 (1980), the Supreme Court defined a two step approach to determining whether a penalty is civil or criminal. The first step requires the court to determine whether the legislature expressed a civil or criminal purpose behind the statute. Id. at 249, 100 S.Ct. at 2641-42. If the statute was intended to be civil in nature, the second step is to determine "whether the statutory scheme [is] so punitive either in purpose or effect as to negate that intention." Id. To determine whether the purpose or effect of a statute is punitive, courts are guided by a seven-factor analysis established in Kennedy v. Mendoza-Martinez, 372 U.S. 144, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963); Van Harken v. City of Chicago, 906 F.Supp. 1182, 1190-92 (N.D.Ill.1995), aff'd as modified, 103 F.3d 1346 (7th Cir.), cert. denied, __ U.S. __, 117 S.Ct. 1846, 137 L.Ed.2d 1049 (1997) (holding fines for parking violations are not criminal in nature under the factors supplied by Mendoza-Martinez).

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21. This Court recognizes that the Supreme Court in Bennis did not overrule the Michigan high court's decision to reduce the forfeiture under its equitable powers. This fact, however, does not detract from the forcefulness of the Supreme Court's ultimate finding, that the civil in rem forfeiture procedure was constitutional.

These factors are:

> [1] Whether the sanction involves an affirmative disability or restraint, [2] whether it has historically been regarded as a punishment, [3] whether it comes into play only on a finding of scienter, [4] whether its operation will promote the traditional aims of punishment — retribution and deterrence, [5] whether the behavior to which it applies is already a crime, [6] whether an alternative purpose to which it may rationally be connected is assignable for it, and [7] whether it appears excessive in relation to the alternative purpose assigned. . . .

Mendoza-Martinez, 372 U.S. at 168-69, 83 S.Ct. at 567-68 (footnotes omitted). Where a statute is intended to be civil, it should be found criminal "only with the clearest of proof. . . ." Ward, 448 U.S. at 249, 100 S.Ct. at 2641-42.

Application of these factors, here, reveals that four of them (1, 3, 5, and 6) support the civil nature of the ordinances, two factors (2 and 7) are non-dispositive, and only one (4) supports the ordinances as being criminal in nature. Initially, an individual is not affirmatively restrained or disabled by the temporary seizure of his or her automobile. Further, a monetary fine is not an affirmative restraint or disability. Van Harken, 906 F.Supp. at 1191 (finding parking fine of $200 was not a restraint or disability). Moreover, the ordinance does not specify any required state of mind for violations. Thus, evidence of scienter is not required.

Additionally, because Illinois has enacted statutes criminalizing the same behavior (with substantial penalties possible), it is clear that the City's ordinances were not designed to duplicate the criminal penalties for these offenses. See, e.g., Controlled Substances Act, 720 ILL. COMP. STAT. 570/100; 570/402 (West 1993 & Supp.1997) (Class 1 Felony); Cannabis Control Act, 720 ILL. COMP. STAT. 550/1, 550/4 (West 1993 & Supp.1997)(ranging from Class C Misdemeanor to Class 3 Felony); Deadly Weapons, 720 ILL. COMP. STAT. 5/24 (West 1993 & Supp.1997) (Class A Misdemeanor for possessing firearm in automobile); see also, Van Harken, 906 F.Supp. at 1192 (finding parallel criminal statute providing fines for parking violations as petty offenses fails to demonstrate that parking fines are also criminal in nature).

Finally, "[w]hile every fine does have some retributive and deterrent effects," Van Harken, 906 F.Supp. at 1191, there are alternative reasons for the City's ordinances. For example, § 8-20-015 encourages registration of handguns and serves to regulate their transportation in highly populated environments, and § 7-24-225 encourages registration of controlled substances under state law. Thus, the challenged fines cannot be reasonably labeled excessive in relation to these alternative purposes.

Because the ordinances in question lack a historical reference, they cannot be analyzed directly against the intent and effect of former laws outlining the same violations. However, an analogy can be drawn to traffic violations which also involves vehicles, impoundment, and fines for violations. Parking fines are not criminal in nature. See Van

Harken, 103 F.3d at 1350. However, because financial penalties have been imposed under both civil and criminal statutes, (see, e.g., Bennett v. Spear, 516 U.S. 994, __, 117 S.Ct. 1154, 1166, 137 L.Ed.2d 281 (1997) (Endangered Species Act of 1973, 16 U.S.C. § 1540(a)-(b), provides for both civil and criminal fines)), this factor favors neither position.

Although the City's ordinance arguably includes punitive and deterrent elements, it is also remedial in nature. While this factor, perhaps, best supports the argument that the ordinance is criminal, it cannot overcome the combined weight of the other factors.

In sum, analysis of the factors provided in Mendoza-Martinez demonstrates that the fines imposed for possession of an unregistered firearm or controlled substances in an automobile, or for playing loud music on a car stereo, are civil, not criminal, in nature. Accordingly, because enforcing the City's ordinances do not require criminal due process protections, the ordinances and fines do not violate the Substantive Due Process Clause of the Fourteenth Amendment.

i. Mr. Amos' Claims

Mr. Amos does not state a claim on which relief can be granted. Mr. Amos fails to allege that the substance of § 11-4-1115, under which his hearing occurred, denied him due process. His claims are dissimilar from Ms. Towers and Mr. Sturdivant's, because he does not allege that the City's ordinance precludes an innocent-owner defense, as do the other challenged ordinances.

Further, Mr. Amos misdirects his pleadings toward a perceived substantive due process claim, which only supports his contention that the officers who seized and impounded his vehicle did so without probable cause. Simply stated, Mr. Amos' allegations concern only this factual, evidentiary determination. Thus, Mr. Amos fails to state a claim upon which relief can be granted, for Fourteenth Amendment due process violations.

ii. Ms. Towers' Claims

Ms. Towers fails to state a claim for substantive due process violations under the Fourteenth Amendment. The Court finds Bennis to be controlling here. Because civil forfeiture actions need not supply an innocent-owner defense to comport with the constitutional substantive due process safeguards, the City's ordinances do not violate Ms. Towers' right to due process. Thus, Ms. Towers fails to state a claim upon which relief can be granted, for Fourteenth Amendment due process violations.

iii. Mr. Sturdivant's Claims

Likewise, Mr. Sturdivant has failed to state a claim upon which relief can be granted. Mr. Sturdivant's allegations directly mirror those of Ms. Towers. Although his claims do permit an inference that he intended to challenge the statutes both facially and as applied to him in this instance, the claims fail equally under either approach.

Appendix D

2. Counts IV, V and XIII: Eighth Amendment Excessive Fines Claims

The term "fine" denotes payments extracted by the government, which are payable to the government. See Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 265-66, 109 S.Ct. 2909, 2915-16, 106 L.Ed.2d 219 (1989) (finding Excessive Fines Clause was intended to limit fines by the government, and not to limit private civil damages). Eighth Amendment[22] protections against excessive fines are not limited to criminal proceedings; they also apply to civil proceedings. Austin, 509 U.S. at 607, 113 S.Ct. at 2804.

Plaintiffs assert claims under the Eighth Amendment, contending that a $500 fine is unconstitutionally excessive because it bears no relationship to their culpability as innocent owners. To buttress their assertions, Plaintiffs contend that two Supreme Court cases support this rationale. (Pls.' Resp., at 18-21 (citing Austin, 509 U.S. 602, 113 S.Ct. 2801, 125 L.Ed.2d 488; Alexander v. United States, 509 U.S. 544, 113 S.Ct. 2766, 125 L.Ed.2d 441 (1993)).) On the other hand, the City contends that Bennis, 516 U.S. 442, 116 S.Ct. 994, 134 L.Ed.2d 68, controls, and this Court agrees.

In Austin, the Supreme Court looked past the labels of "criminal" and "civil" penalties to determine whether a civil

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22. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted." U.S. CONST. amend. VIII.

in rem forfeiture procedure can constitute punishment. Austin, 509 U.S. at 610, 113 S.Ct. at 2805-06. The Supreme Court recognized, as it had before in United States v. Halper, 490 U.S. 435, 448, 109 S.Ct. 1892, 1901-02, 104 L.Ed.2d 487 (1989), that civil sanctions, in addition to serving remedial purposes, can serve retributive and deterrent purposes as well. Id. at 610, 113 S.Ct. at 2805-06. It is only when a civil sanction serves either a retributive or deterrent purpose, that it becomes, in part, punishment. Id. Thus, the Supreme Court held that the Eighth Amendment applies to civil in rem forfeiture proceedings only when those proceedings contain retributive or deterrent elements. Id. at 622, 113 S.Ct. at 2812.

In its analysis, the Supreme Court discussed the evolution of civil in rem forfeiture actions and its historical rejection of the innocent-owner defense in that context. Austin, 509 U.S. at 615, 113 S.Ct. at 2808. In particular, the Supreme Court stated that:

> [F]orfeiture has been justified on two theories — that the property itself is "guilty" of the offense, and that the owner may be held accountable for the wrongs of others to whom he entrusts his property. Both theories rest, at bottom, on the notion that the owner has been negligent in allowing his property to be misused and that he is properly punished for that negligence.

id.

Appendix D

In both Austin and Alexander, the plaintiffs were convicted criminals, serving prison sentences. In Austin, the government had, in addition to his criminal sentence of seven years imprisonment (for possession of cocaine with intent to deliver), sought and obtained a civil forfeiture of the plaintiff's mobile home and body shop. Id. at 604, 113 S.Ct. at 2803. In Alexander, the government had, in addition to his criminal sentence of six years imprisonment and fine of $100,000 (for tax evasion, obscenity offenses and RICO violations), sought and won forfeiture of the plaintiff's wholesale and retail business assets and $9 million. Alexander, 509 U.S. at 548, 113 S.Ct. at 2769-70.

Because civil forfeitures against criminals must be reviewed for excessiveness under Austin and Alexander, Plaintiffs argue that the same should be done for innocent owners who have committed no crimes. This argument, however, ignores the principles laid out in Bennis concerning the non-availability of an innocent-owner defense in forfeiture proceedings. Unlike Bennis, neither Austin nor Alexander promulgates any findings or rulings on the innocent-owner defense. See Austin, 509 U.S. at 616 n. 10, 113 S.Ct. at 2809 n. 10 (noting "[b]ecause the forfeiture provisions at issue here exempt 'innocent owners,' we again have no occasion to decide in this case whether it would comport with due process to forfeit the property of a truly innocent owner."). Moreover, the Supreme Court also cautioned against relying on a mistaken technical distinction between in rem and in personam proceedings. Austin, 509 U.S. at 616, 113 S.Ct. at 2808-09. In sum, the Supreme Court's decision only holds that, forfeiture is a payment to a sovereign as punishment, at least in part, for some offense,

subject to the limitations established by the Eighth Amendment's Excessive Fines Clause. Id. at 622, 113 S.Ct. at 2812.

Whether a fine is excessive is a question for this Court to determine. Id.; Alexander, 509 U.S. at 559, 113 S.Ct. at 2775-76. The essential point of Plaintiffs' claims is that they lacked scienter; they were unaware of, and did not authorize the use of, their vehicles for illegal purposes. If the City's ordinances required a finding of scienter, Plaintiffs could state a claim. The ordinances, however, like the one at issue in Bennis, do not require a showing of scienter, making Plaintiffs allegations irrelevant.

In between the polar extremes of having property stolen, and expressly consenting to use of the property for illegal purposes, Plaintiffs find themselves in a conundrum. If they did not consent to the use of their cars at all, it is reasonable to presume that the cars had been stolen. The City's ordinances provide for such an event, by permitting victims of theft to report their automobiles as stolen within twenty-four hours from the time they discover the theft, or reasonably should have discovered the theft. If the car is not reported stolen, even if an owner does not expressly consent to permit another to use his or her vehicle, the only rational conclusion is that the owner gave at least some degree of implied consent to that person to use the car, either before or after its use. When an owner consents to release control of his or her vehicle to another person, expressly or otherwise, the owner also accepts the risks inherent to that loss of control. See Harmony v. United States, 43 U.S. (2 How.) 210, 234, 11 L.Ed. 239 (1844) (holding that the

offenses of the captain and crew bind the owner of a ship, "whether he be innocent or guilty; and [the owner] impliedly submits to whatever the law denounces as a forfeiture attached to the ship by reason of their unlawful or wanton wrongs.").

Through this notion of attaching responsibility to one's property, the law endeavors to create "the desirable effect of inducing [owners] to exercise greater care in transferring possession of their property." Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 688, 94 S.Ct. 2080, 2094, 40 L.Ed.2d 452 (1974). The durability of this concept is evidence of the force of its rationale. Over one hundred years ago, the Supreme Court stated:

> [T]he unlawful acts of the [borrower] bind the owner of the property, in respect to the management of the same, as much as if they were committed by the owner himself. Power to that effect the law vests in him by virtue of his [loan]; and, if he abuses his trust, it is a matter to be settled between him and his [borrower]; but the acts of violation as to the penal consequences to the property are to be considered just the same as if they were the acts of the owner.

Dobbins' Distillery v. United States, 96 U.S. 395, 404, 24 L.Ed. 637 (1877). The Court does not see any reason to abandon this well-reasoned rationale under the circumstances presented in the case sub judice.

Ms. Towers and Mr. Sturdivant state, in support of their claims: that they have committed no crimes; did not consent

to the use of their vehicles by another; did not consent and were unaware that illegal drugs and/or firearms were present in their automobiles; did not know, or should not have reasonably known, that the occupant controlling their vehicles possessed an illegal item. (Complaint, Count IV at ¶ 32; Count V at ¶ 35.)[23] None of the plaintiffs allege that their vehicles were stolen. Therefore, they have, in some measure, consented to the use of their vehicles by another, and the consequences thereof are "a matter to be settled between [Plaintiffs] and [those who have used their vehicles]." Dobbins' Distillery, 96 U.S. at 404.

For the reasons set forth above, the Court finds that the City's fines are analogous to fines levied in civil in rem forfeiture proceedings, and are not excessive under the Eighth Amendment's Excessive Fines Clause.

3. Counts VIII and IX: Fourth Amendment Unreasonable Seizure Claims

Ms. Towers and Mr. Sturdivant assert that impoundment of their vehicles constitutes an unreasonable seizure under the Fourth Amendment.[24] The Fourth

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23. Mr. Amos simply contends that he is innocent for he has violated no state or federal law. (Complaint, Count XIII at ¶ 30.) He does not allege that he has been fined after availing himself of his right to a final hearing. As such, he lacks standing to assert a claim under the Eighth Amendment. See Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 96 S.Ct. 1917, 48 L.Ed.2d 450 (1976) (holding federal courts must determine whether a plaintiff has been injured in order to determine if he or she has standing such that the court can exercise its jurisdiction).

24. Mr. Amos asserts no claims under the Fourth Amendment.

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Amendment provides, in pertinent part, that the "right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated. . . ." U.S. CONST. amend. IV.

A seizure of property occurs where "there is some meaningful interference with an individual's possessory interests in that property." United States v. Jacobsen, 466 U.S. 109, 113, 104 S.Ct. 1652, 1656, 80 L.Ed.2d 85 (1984). The Fourth Amendment is applicable to state actors by operation of the Fourteenth Amendment. Ker v. California, 374 U.S. 23, 30, 83 S.Ct. 1623, 1628, 10 L.Ed.2d 726 (1963). The Fourth Amendment's protection also applies to personal property in the civil context. Soldal v. Cook County, Ill., 506 U.S. 56, 67, 113 S.Ct. 538, 546-47, 121 L.Ed.2d 450 (1992).

Courts have interpreted the Fourth Amendment to require any seizure by the government to be reasonable under any circumstances. See United States v. Cardona-Sandoval, 6 F.3d 15, 23 (1st Cir.1993) (seizure of ship); Conner v. City of Santa Ana, 897 F.2d 1487, 1492 (9th Cir.), cert. denied, 498 U.S. 816, 111 S.Ct. 59, 112 L.Ed.2d 34 (1990) (seizure of junk cars); Soldal, 506 U.S. at 72, 113 S.Ct. at 549 (removal of mobile home). Under the Fourth Amendment, " 'reasonableness is still the ultimate standard'. . . ." Soldal, 506 U.S. at 71, 113 S.Ct. at 548-49 (quoting Camara v. Municipal Court of City and County of San Francisco, 387 U.S. 523, 539, 87 S.Ct. 1727, 1736, 18 L.Ed.2d 930 (1967)).

In this case, Plaintiffs do not allege that the officers impounding the vehicles acted unreasonably. Rather, they

allege that the ordinances themselves, providing for the seizure of their vehicles, are unreasonable. In particular, neither Ms. Towers nor Mr. Sturdivant allege that the officers lacked probable cause to seize their vehicles (which contained illegal items). Rather, they contest the constitutionality of the ordinances, because of their application to innocent owners.

The test for whether a seizure is reasonable requires a careful balance between governmental and private interests. Soldal, 506 U.S. at 72, 113 S.Ct. at 549. In Soldal, the Supreme Court set out a high hurdle for persons challenging the reasonableness of a seizure. In that case, where officers were executing the law pursuant to a court order, the Supreme Court found that a showing of unreasonableness would be a "laborious task indeed." Id. In view of the fact that an officer executes the law under an ordinance, just as he or she would under a court order, the same standard of reasonableness applies to the facts of the case at bar.

Because Plaintiffs have not stated a claim on which relief can be granted with respect to their alleged constitutional violations under § 1983, they have not demonstrated that the ordinances are unreasonable. Therefore, Plaintiffs have failed to state a claim upon which relief can be granted under the Fourth Amendment.

4. Count XIV: Class Action Claim

Plaintiffs reallege all of the foregoing constitutional challenges under a claim for class action. Because the Plaintiffs' claims, on which this proposed class action is

based, fail to state a claim upon which relief could be granted, this class action count also fails. Assuming, arguendo, that Plaintiffs' previous claims had survived, Plaintiffs still fail to meet the requirements for certifying a class, as addressed below.

II. Plaintiffs' Motion to Certify Class

Plaintiffs seek certification of a plaintiff class under Federal Rule of Civil Procedure 23.[25] There is broad judicial discretion in determining whether to allow the certification of a class action. First Interstate Bank of Nevada, N.A. v. Chapman & Cutler, 837 F.2d 775, 781 (7th Cir.1988) (certification decision is committed to the sound discretion of the court); McGarvey v. Citibank, No. 95 C 123, 1995 WL 404866, at *2 (N.D.Ill. July 5, 1995); see also 7B CHARLES A. WRIGHT, ARTHUR R. MILLER, & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE,

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25. Plaintiffs' proposed class consists of registered owners of automobiles, in the City of Chicago, whose vehicles have been or will be impounded by the City, pursuant to Chicago Municipal Code §§ 7-24-225 (unlawful drugs in moving vehicles), 8-20-015 (Unlawful firearm in motor vehicle), 11-4-115 (sound device restrictions for excessive noise), 8-8-060 (prostitution or solicitation), and 8-16-020 (curfew). Because none of the named Plaintiffs has asserted claims concerning §§ 8-8-060 and 8-16-020, they lack standing to bring claims on behalf of unnamed plaintiffs affected by those sections.

Accordingly, the proposed class would be limited to owners who: were precluded under the ordinances from pleading an innocent-owner defense, had not violated any state or federal criminal law, or activity proscribed by the remaining ordinances, yet were forced to pay a fine nonetheless. (Pls.' Mot. to Certify Class, at 2.)

CIVIL 2D § 1785, at 119 (1986). To obtain class certification, plaintiffs must meet all of the requirements of Rule 23. Patterson v. General Motors Corp., 631 F.2d 476, 480 (7th Cir.1980), cert. denied, 451 U.S. 914, 101 S.Ct. 1988, 68 L.Ed.2d 304 (1981). The burden of showing that all of the demanding requirements of Rule 23 have been satisfied, thereby demonstrating that certification is proper, rests with the plaintiff. See General Telephone Co. of Southwest v. Falcon, 457 U.S. 147, 161, 102 S.Ct. 2364, 2372-73, 72 L.Ed.2d 740 (1982); Trotter v. Klincar, 748 F.2d 1177, 1184 (7th Cir.1984); Riordan v. Smith Barney, 113 F.R.D. 60, 62 (N.D.Ill.1986).

Rule 23 establishes a two-step procedure to determine whether a class action is appropriate. See In re Bally Mfg. Sec. Corp. Litig., 141 F.R.D. 262, 266 (N.D.Ill.1992). Initially, the preliminary requirements set forth in Rule 23(a) must be met:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

If these criteria are satisfied, the Court then considers whether the action falls within any of the three categories of class suits provided for in the subsection of Rule 23(b).[26]

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26. Here, Plaintiffs seek class certification under Rules 23(b)(2) and 23(b)(3). Under Rule 23(b)(2), once the class fulfills

(Cont'd)

Here, Plaintiffs fail to satisfy the numerosity requirement of Rule 23(a)(1). The court may find numerosity under Rule 23(a)(1) if the class is so numerous that joinder of all members of the class is impracticable. Plaintiffs are not required to specify an exact number in order to satisfy the requirement. Vergara v. Hampton, 581 F.2d 1281, 1284 (7th Cir.1978), cert. denied, 441 U.S. 905, 99 S.Ct. 1993, 60 L.Ed.2d 373 (1979). However, that does not mean that Plaintiffs can rely on a conclusory allegation that joinder is impracticable or on speculation as to the size of the class to prove the numerosity requirement. Marcial v. Coronet Ins. Co., 880 F.2d 954, 957 (7th Cir.1989); Patterson, 631 F.2d at 481; Valentino v. Howlett, 528 F.2d 975, 978 (7th Cir.1976).

Plaintiffs have made only conclusory allegations on the impossibility of joinder. These conclusions are based on their speculation that the proposed class is "extremely large," numbering potentially "hundreds, perhaps thousands" of members. (Pls.' Mem. in Supp. of Mot. to Certify Class, at 8-9.) Absent from Plaintiffs' motion or memorandum is any support for these figures. Plaintiffs argue that, common sense assumptions support a finding of numerosity where the class consists of a thousand or more members, and that the Court may make a good faith estimate as to the size of the proposed class. (Id., citing Grossman v. Waste Management Inc., 100 F.R.D. 781, 785

(Cont'd)

the threshold requirements, the court must then determine whether the defendant acted on grounds applicable to the class as a whole. Under Rule 23(b)(3), the court must determine whether a class action is "superior" to other methods of adjudication.

(N.D.Ill.1984); In re VMS Sec. Litig., 136 F.R.D. 466, 473 (N.D.Ill.1991); Gomez v. State Bd. of Educ., 117 F.R.D. 394, 399 (N.D.Ill.1987).)

While it is likely that hundreds or thousands of registered owners of motor vehicles appear before the City's hearing officers due to alleged violations of the challenged ordinances, Plaintiffs present no evidence that would permit this Court to infer that a sufficient number of these persons are "innocent-owners" — as described by the Plaintiffs — such that the requirements of Rule 23(a)(1) would be satisfied. See, e.g., Gomez, 117 F.R.D. at 399 (certifying class where statistics permitted court to draw reasonable conclusion of numerosity despite objections as to the reliability and accuracy of the statistics). Having been presented with only a large pool of persons within which a class may or may not exist, without more, the Court may not reason, in good faith, that numerosity has been met. See Jackson v. Harris, 84 F.R.D. 602, 605-06, (N.D.Ind.1979) (denying class certification where large pool of social security recipients did not justify any inference that they were affected by the challenged social security regulation).

The Court is sympathetic to Plaintiffs' argument that pursuing these individual claims is cost-prohibitive to potential class members. (Pls.' Mem. in Supp. of Mot. to Certify Class, at 10.) However, that argument does not cause the Court to reach an inference that numerosity has been met.

The Court need not, therefore, discuss "commonality," "typicality," or "adequacy of representation," and, likewise,

does not reach the second step of the class certification analysis. For the foregoing reasons, Plaintiffs motion for class certification is denied.

III. Plaintiffs' Motion for Injunctive Relief

A motion for preliminary injunctive relief is properly brought under Federal Rule of Civil Procedure 65. Although the Seventh Circuit has stated the test in various ways, to prevail on a motion for preliminary injunction, the movant must initially demonstrate three threshold requirements. Storck USA, L.P. v. Farley Candy Co., 14 F.3d 311, 313-14 (7th Cir.1994). The movant must show that: (1) the case has some likelihood of success on the merits;[27] (2) there exists no adequate remedy at law;[28] and (3) the movant will suffer irreparable harm if the preliminary injunction is not granted. Id. If these conditions are met, the initial threshold has been cleared and the Court must next: (1) balance the harm to the movant if the injunction is not issued, against the harm to the defendant if it is issued improvidently;[29]

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27. In determining the likelihood of success on the merits, the court must at least find that the petitioner's chances are "better than negligible". Kinney v. International Union of Operating Eng'rs, Local 150, 994 F.2d 1271, 1278 (7th Cir.1993).

28. Lack of an adequate remedy at law ordinarily means that money damages would not suffice. American Medicorp, Inc. v. Continental Illinois Nat'l Bank and Trust Co. of Chicago, 475 F.Supp. 5, 7 (N.D.Ill.1977).

29. The balancing requires a "sliding scale" analysis wherein "the greater the movant's chance of success on the merits, the less strong a showing it must make that the balance of harms is in its favor." Storck, 14 F.3d at 314.

and (2) after weighing the interest of the parties, additionally consider the public interest (i.e. non-parties) consequences of either a grant or denial of the injunction.[30] Id.

Because Plaintiffs have failed to satisfy the criteria necessary to certify a class, any request for injunctive relief must be analyzed as applied to the individual movants. Coleman, 40 F.3d at 259. Without proof of an impending injury similar to the one allegedly already suffered, equitable relief is not available to a plaintiff absent some live controversy. City of Los Angeles v. Lyons, 461 U.S. 95, 105, 103 S.Ct. 1660, 1666-67, 75 L.Ed.2d 675 (1983). Further, a plaintiff may not speculate or hypothesize a claim of future injury to gain standing to effectively assert a claim for equitable relief. Palmer v. City of Chicago, 755 F.2d 560, 572 n. 9 (7th Cir.1985), cert. denied, 481 U.S. 1049, 107 S.Ct. 2180, 95 L.Ed.2d 836 (1987); see also Shipman v. Missouri Dep't of Family Servs., 877 F.2d 678, 681 (8th Cir.1989), cert. denied, 493 U.S. 1045, 110 S.Ct. 842, 107 L.Ed.2d 837 (1990).

In this case, none of the Plaintiffs has produced any evidence, or even alleged, that the City is likely to seize their vehicles in the future. Therefore, each individual Plaintiff lacks standing to request injunctive relief because each has failed to satisfy his or her burden of proof.

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30. The public interest factor is not dispositive. Abbott Labs. v. Mead Johnson & Co., 971 F.2d 6, 12 n. 3 (7th Cir.1992). Thus, for example, where a movant clears the threshold and shows that the balance of harms tip significantly in his favor, preliminary injunctive relief is proper even though it might slightly impair the public interest.

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Even if, arguendo, the proposed class had been certified, Plaintiffs still fail to meet the preliminary threshold requirements for a class action. First, as discussed above, Plaintiffs have failed to state a claim on which relief can be granted. Therefore, there is no likelihood of success on the merits. Kinney, 994 F.2d at 1278. Second, Plaintiffs have alleged no damages other than fines, towing and storage fees, and monetary damages associated with the loss of their vehicles for a temporary period. Because money damages would suffice in this instance, Plaintiffs have an adequate remedy at law. American Medicorp, 475 F.Supp. at 7. Likewise, Plaintiffs have failed to allege that they would suffer any irreparable harm.

Therefore, Plaintiffs fail to clear the threshold requirements for a preliminary injunction, and their Motion for Injunctive Relief is, therefore, denied.

CONCLUSION

For the foregoing reasons, Plaintiffs have failed to state a claim upon which relief can be granted.

IT IS THEREFORE ORDERED that:

Defendant's Motion to Dismiss be, and the same hereby is, GRANTED.

IT IS FURTHER ORDERED that:

Plaintiffs' Motion to Certify Class, and Plaintiffs' Motion for Preliminary Injunctive Relief be, and the same hereby are, DENIED.

APPENDIX E — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION DATED SEPTEMBER 30, 1997

United States District Court
Northern District of Illinois
Eastern Division

Case Number: 96 C 6510

Sandra Towers, et al

v.

City of Chicago

JUDGMENT IN A CIVIL CASE

* * *

■ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Plaintiffs' Motion to Certify Class and Plaintiffs' Motion for Preliminary Injunction are denied. Defendant's Motion to Dismiss is granted.

Michael W. Dobbins, Clerk of Court

Date: 9/30/97

s/ Vernita K. Davis
Vernita K. Davis, Deputy Clerk

APPENDIX F — RELEVANT STATUTES AND ORDINANCES

Chicago Municipal Code § 7-24-225
Unlawful drugs in motor vehicle

Impoundment.

(a) The owner of record of any motor vehicle that contains any controlled substance or cannabis, as defined in the Controlled Substances Act, 720 ILCS 570/100, et seq., and the Cannabis Control Act, 720 ILCS 550/1, et seq., or that is used in the purchase, attempt to purchase, sale, or attempt to sell such controlled substances or cannabis shall be liable to the city for an administrative penalty of $500.00 plus any applicable towing and storage fees. Any such vehicle shall be subject to seizure and impoundment pursuant to this section. This subsection shall not apply: (1) if the vehicle used in the violation was stolen at the time and the theft was reported to the appropriate police authorities within 24 hours after the theft was discovered or reasonably should have been discovered; (2) if the vehicle is operating as a common carrier and the violation occurs without the knowledge of the person in control of the vehicle; or (3) if the owner proves that the presence of the controlled substance or cannabis was authorized under the Controlled Substances Act or the Cannabis Control Act.

(b) Whenever a police officer has probable cause to believe that a vehicle is subject to

seizure and impoundment pursuant to this section, the police officer shall provide for the towing of the vehicle to a facility controlled by the city or its agent. When the vehicle is towed, the police officer shall notify any person identifying himself as the owner of the vehicle or person who is found to be in control of the vehicle at the time of the alleged violation, if there is such a person, of the fact of the seizure and of the vehicle owner's right to request a preliminary hearing to be conducted under this section.

(c) A hearing officer of the city shall conduct a preliminary hearing within 24 hours after the seizure, unless the Department of Police determines that it must retain custody of the vehicle under applicable state or federal forfeiture law. All interested persons shall be given a reasonable opportunity to be heard at the preliminary hearing. The formal rules of evidence will not apply at the hearing, and hearsay evidence shall be admissible. If, after the hearing, the hearing officer determines that there is probable cause to believe that the vehicle is subject to impoundment and seizure under subsection (a) of this section, the hearing officer shall order the continued impoundment of the vehicle as provided in this section unless the owner of the vehicle posts with the city a cash bond in the amount of $500.00 plus the accumulated costs of towing and storing. If the

hearing officer determines that there is no such probable cause, the vehicle will be returned without penalty or other fees.

(d) Within 10 days after a vehicle is seized and impounded pursuant to this section, the city shall notify by certified mail, return receipt requested, the owner of record of the date, time and location of a hearing that will be conducted pursuant to this section. The hearing shall be scheduled and held, unless continued by order of the hearing officer, no later than 30 days after the vehicle was seized. All interested persons shall be given a reasonable opportunity to be heard at the hearing. If, after the hearing, the hearing officer determines by a preponderance of evidence that the vehicle was used in the manner set forth in subsection (a), and that none of the exceptions described in clauses (1) through (3) of subsection (a) applies, then the hearing officer shall enter an order finding the owner of record of the vehicle civilly liable to the city for an administrative penalty in the amount of $500.00, plus towing and storage costs. If the hearing officer finds that no such violation occurred, the hearing officer shall order (1) the immediate return of any cash bond posted, or (2) where the vehicle is in the city's possession, the return of such vehicle, except that no vehicle shall be returned to the owner of record unless and until the city receives notice from the appropriate state or, where applicable, federal

officials that (i) forfeiture proceedings will not be instituted, or (ii) forfeiture proceedings have concluded and there is a settlement or a court order providing that the vehicle shall be returned to the owner of record.

(e) If an administrative penalty is imposed pursuant to this section, such penalty shall constitute a debt due and owing to the city. The record owner's obligation to pay such debt to the city shall be independent of the city's return of any impounded vehicle. If a cash bond has been posted pursuant to this section, the bond shall be applied to the penalty, except as provided otherwise in this section, an impounded vehicle shall be returned to the record owner, or other person who is legally entitled to possess the vehicle, upon his or her payment to the city of the penalty, plus any applicable towing and storage fees, unless the vehicle has been sold or otherwise disposed of to satisfy a judgment or enforce a lien as provided by law. Notwithstanding any other provision of this section, no vehicle shall be returned to the record owner unless and until the city has received notice from the appropriate state or, where applicable, federal officials that (i) forfeiture proceedings have concluded and there is a settlement or court order providing that the vehicle shall be returned to the owner of record.

(f) Any motor vehicle that is not reclaimed within 30 days after the expiration of the time

during which the owner of record may seek judicial review of the city's action under this section, or the time at which a final judgment is rendered in favor of the city, or the time a final administrative decision is rendered against an owner of record who is in default, may be disposed of as an unclaimed vehicle as provided by law; provided, however, that where proceedings have been instituted under state or federal drug asset forfeiture laws, the subject vehicle may not be disposed of by the city except is consistent with those proceedings. Where the vehicle is sold by the city and the proceeds from the sale are greater than the amount due the city in penalty and towing and storage costs, then the owner of record may obtain those net proceeds by filing a claim with the city.

(g) As used in this section, the "owner of record" of a vehicle means the record title holder.

(h) Fees for towing and storage of a vehicle under this section shall be the same as those charged pursuant to Chapter 9-96 of this code. (Added. Coun. J. 3-9-95, p. 66176)

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Appendix F

Chicago Municipal Code § 8-20-015
Unlawful firearm in motor vehicle

(a) The owner of record of any motor vehicle that contains an unregistered firearm or a firearm that is not broken down in a nonfunctioning state shall be liable to the city for an administrative penalty of $500.00 plus any towing and storage fees applicable under Section 9-92-080. Any such vehicle shall be subject to seizure and impoundment pursuant to this section. This subsection shall not apply: (1) If the vehicle used in the violation was stolen at that time and the theft was reported to the appropriate police authorities within 24 hours after the theft was discovered or reasonably should have been discovered; (2) if the vehicle is operating as a common carrier and the violation occurs without the knowledge of the person in control of the vehicle; or (3) if the owner proves that the presence of the firearm was permissible pursuant to paragraphs (1) through (10) Section 8-20-010 or, in the case of an unregistered firearm, was exempt from registration under subsection (b) of Section 8-20-040.

(b) Whenever a police officer has probable cause to believe that a vehicle is subject to seizure and impoundment pursuant to this section, the police officer shall provide for the towing of the vehicle to a facility controlled by

the city or its agents. Before or at the time the vehicle is towed, the police officer shall notify any person identifying himself as the owner of the vehicle or any person who is found to be in control of the vehicle at the time of the alleged violation, of the fact of the seizure and of the vehicle owner's right to request a vehicle impoundment hearing to be conducted under this section.

(c) Whenever the owner of record of a vehicle seized pursuant to this section makes a request of the department of revenue in person and in writing for a vehicle impoundment hearing within 12 hours after the seizure, a hearing officer of the department of revenue shall conduct the vehicle impoundment hearing within 24 hours after the seizure, excluding Sundays and legal holidays. All interested persons shall be given a reasonable opportunity to be heard at the vehicle impoundment hearing. The formal rules of evidence will not apply at the hearing, and hearsay evidence shall be admissible. If, after the hearing, the hearing officer determines that there is probable cause to believe that the vehicle is subject to seizure and impoundment under subsection (a), the hearing officer shall order the continued impoundment of the vehicle as provided in this section unless the owner of the vehicle posts with the department of revenue a cash bond in the amount of $500.00 plus any applicable towing and storage fees.

(d) Within 10 days after a vehicle is seized and impounded pursuant to this section, the city shall notify by certified mail, return receipt requested, the owner of record of the date, time and location of a hearing that will be conducted pursuant to this section. The hearing shall be scheduled and held, unless continued by order of the hearing officer, no later than 30 days after the vehicle was seized. The hearing shall be conducted by a hearing officer of the department of revenue. All interested persons shall be given a reasonable opportunity to be heard at the hearing. If, after the hearing, the hearing officer determines by a preponderance of evidence that the vehicle contained an unregistered firearm or a firearm not broken down in a nonfunctioning state, and that none of the exceptions described in clauses (1) through (3) of subsection (a) applies, the hearing officer shall enter an order finding the owner of record of the vehicle civilly liable to the city for an administrative penalty in the amount of $500.00. If the owner of record fails to appear at the hearing, the hearing officer shall enter a default order in favor of the city requiring the payment to the city of an administrative penalty in the amount of $500.00. If the hearing officer finds that no such violation occurred, the hearing officer shall order the immediate return of the owner's vehicle or cash bond.

(e) If an administrative penalty is imposed pursuant to this section, such penalty shall

constitute a debt due and owing to the city. If a cash bond has been posted pursuant to this section, the bond shall be applied to the penalty. If a vehicle has been impounded when such a penalty is imposed the city may seek to obtain a judgment on the debt and enforce such judgment against the vehicle as provided by law. Except as provided otherwise in this section the vehicle shall continue to be impounded until (1) the penalty, plus any applicable towing and storage fees, is paid to the city, in which case possession of the vehicle shall be given to the person who is legally entitled to possess the vehicle, or (2) the vehicle is sold or otherwise disposed of to satisfy a judgment or enforce a lien as provided by law. If the administrative penalty and applicable fees are not paid within 30 days after an administrative penalty is imposed under subsection (d) against an owner of record who defaults by failing to appear at the hearing, the vehicle shall be deemed unclaimed and shall be disposed of in the manner provided by law for the disposition of unclaimed vehicles. In all other cases, if the administrative penalty and applicable fees are not paid within 30 days after the expiration of time at which administrative review of the hearing officer's determination may be sought, or within 30 days after an action seeking, administrative review has been resolved in favor of the city, whichever is applicable, the vehicle shall be deemed unclaimed and shall be disposed of in the manner provided by law for the disposition of unclaimed vehicles.

Appendix F

Except as otherwise specifically provided by law, no owner, lienholder or other person shall be legally entitled to take possession of a vehicle impounded under this section until the civil penalty and fees applicable under this section have been paid. However, whenever a person with a lien of record against an impounded vehicle has commenced foreclosure proceedings, possession of the vehicle shall be given to that person if he or she agrees in writing to refund to the city the amount of the net proceeds of any foreclosure sale, less any amounts required to pay all lienholders of record, up to $500.00 plus the applicable fees.

(f) For purposes of this section, the "owner of record" of a vehicle is the record title holder. (Added. Coun. J. 7-7-92, p. 19196; Amend. 7-14-93, p. 35530)

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